125

(13) (19)

Nos. 07-1090 & 08-539

Supreme Court, U.S.
FILED
FEB 19 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,
Petitioner,
v.
JORDAN BEATY, et al.,
Respondents.

REPUBLIC OF IRAQ, et al.,
Petitioners,
v.
ROBERT SIMON, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX
Volume 1 of 2 (Pages 1-218)

JONATHAN S. FRANKLIN*
ROBERT A. BURGOYNE
TILLMAN J. BRECKENRIDGE
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave, N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

TIMOTHY B. MILLS
MAGGS & MCDERMOTT LLC
910 17th St., N.W., Ste. 800
Washington, D.C. 20006
(202) 457-8090

Counsel for Petitioners
** Counsel of Record*

ANDREW C. HALL*
HALL, LAMB AND HALL, P.A.
2665 South Bayshore Drive
Miami, Florida 33133
(305) 374-5030
andyhall@hlhlawfirm.com

Counsel for Beaty Respondents

STEPHEN A. FENNELL*
STEPTOE & JOHNSON LLP
300 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000
sfennell@steptoe.com

Counsel for Simon Respondents

[*Additional Counsel Listed on Inside Cover*]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002
PETITIONS FOR WRITS OF CERTIORARI FILED
FEB. 19, 2008 (07-1090) AND OCT. 22, 2008 (08-539)
CERTIORARI GRANTED JANUARY 9, 2009

MICHAEL RIPS
ANTHONY A. ONORATO
JUSTIN B. PERRI
STEPTOE & JOHNSON LLP
750 Seventh Avenue
New York, NY 10019
(212) 506-3900

Counsel for Simon Respondents

TABLE OF CONTENTS

VOLUME 1

App.	Name	Page
A	Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 07-7057 (*Beaty*)	1
B	Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 06-7175 (*Simon*)	8
C	Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 06-7178 (*Seyam*)	18
D	Relevant Docket Entries from the United States District Court for the District of Columbia, No. 1:03-cv-00215-JDB (*Beaty*)	20
E	Relevant Docket Entries from the United States District Court for the District of Columbia, No. 1:03-cv-00691-HHK (*Simon*)	28
F	Relevant Docket Entries from the United States District Court for the District of Columbia, No. 1:03-cv-00888-HHK (*Seyam*)	33

G	Relevant Docket Entries from the United States District Court for the District of Columbia, No. 1:01-cv-02674-HHK (*Vine*)	39
H	Excerpts from Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00215 (*Beaty*), filed Feb. 10, 2003	47
I	Excerpts from Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00691 (*Simon*), filed March 18, 2003	50
J	Excerpts from Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00888 (*Seyam*), filed April 15, 2003	57
K	Statement of Interest of the United States in United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*), filed March 15, 2004	64
L	Plaintiffs' Response to the Statement of Interest of the United States in United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*), filed April 14, 2004	99
M	United States' Reply in Support of Its Statement of Interest in United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*), filed May 5, 2004	130

N	Excerpts from First Amended Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00691 (*Simon*), filed Sept. 14, 2004	161
O	Excepts from Second Amended Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00888 (*Seyam*), filed Oct. 8, 2004	171
P	Excerpts from Third Amended Complaint in United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*), filed May 23, 2005	180
Q	Judgment in United States District Court for the District of Columbia, No. 1:03-cv-00691 (*Simon*) (Sept. 7, 2006)	186
R	Judgment in United States District Court for the District of Columbia, No. 1:03-cv-00888 (*Seyam*) (Sept. 7, 2006)	187
S	Memorandum Opinion and Order of United States District Court for the District of Columbia, No. 1:01-cv-02674 (*Vine*) (Sept. 7, 2006), 459 F. Supp. 2d 10 (D.D.C. 2006)	188

VOLUME 2

T	Memorandum Opinion of United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*) (March 20, 2007)	219
U	Order of United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*) (March 20, 2007)	309
V	Order denying initial hearing en banc in United States Court of Appeals for the District of Columbia Circuit, No. 07-7057 (*Beaty*) (Nov. 6, 2007)	311
W	Order granting motion for summary affirmance in United States Court of Appeals for the District of Columbia Circuit, No. 07-7057 (*Beaty*) (Nov. 21, 2007)	313
X	Order requesting briefing on Section 1083 of the National Defense Authorization Act for the Fiscal Year 2008, in United States Court of Appeals for the District of Columbia Circuit, Nos. 06-7175 and 06-7178 (*Simon / Seyam*) (Feb. 4, 2008)	315
Y	Opinion of United States Court of Appeals for the District of Columbia Circuit, No. 06-7175 (*Simon / Seyam*) (June 24, 2008), 529 F.3d 1187 (D.C. Cir. 2008)	317

Z	Judgment of United States Court of Appeals for the District of Columbia Circuit, No. 06-7175 (*Simon / Seyam*) (June 24, 2008)	339
AA	Foreign Assistance Act of 1961, Pub. L. 87-195, § 307, 75 Stat. 424 (1961), codified as amended at 22 U.S.C. § 2227	341
AB	Foreign Assistance Act of 1961, Pub. L. 87-195, § 620A, 75 Stat. 424 (1961), codified as amended at 22 U.S.C. 2371	344
AC	Iraq Sanctions Act of 1990, Pub. L. 101-513, 104 Stat. 1979 (1990), as amended	347
AD	28 U.S.C. § 1605(a)(7) (repealed 2008)	365
AE	National Defense Authorization Act for the Fiscal Year 2008, Pub. L. 110-181, § 1083, 122 Stat. 338 (2008)	367
AF	*Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001)	380
AG	Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 7, 2003)	396
AH	Executive Order 13,303, 68 Fed. Reg. 31,931 (May 22, 2003)	398

AI	Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003)	402
AJ	Letter to Congressional Leaders Reporting on Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions, 39 Weekly Comp. Pres. Doc. 1129 (Aug. 28, 2003)	405
AK	Concurrent Resolution, S. Con. Res. 61, 110th Cong. (Dec. 19, 2007)	409
AL	Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007)	411
AM	Daily Digest, 154 Cong. Rec. H1 (daily ed. January 3, 2008)	415
AN	Statement of Hon. John Conyers, Jr., 154 Cong. Rec. E46-47 (daily ed. Jan. 17, 2008)	417
AO	Daily Digest, 154 Cong. Rec. S53-57 (daily ed. Jan. 22, 2008)	421

AP Presidential Determination No. 2008-9 of January 28, 2008, Waiver of Section 1083 of the National Defense Authorization Act for the Fiscal Year 2008, 73 Fed. Reg. 6571 (Feb. 5, 2008) 422

APPENDIX A

General Docket
United States Court of Appeals for DC Circuit

Court of Appeals Docket #: 07-7057	**Docketed:** 04/13/2007
Nature of Suit: 3360 Other Personal Injury	**Termed:** 11/21/2007
Beaty, Robin, et al v. Repub Iraq	
Appeal From: United States District Court for the District of Columbia	

Case Type Information:
1) Civil Private
2) Private
3) -

Originating Court Information:

District: 0090-1 : 03cv00215 — **Lead:** 03cv00215

Court Reporter: William McAllister
Court Reporter: Bryan Wayne
Trial Judge: John D. Bates, U.S. District Judge
Date Filed: 02/10/2003

Date Order/Judgment:	**Date NOA Filed:**
03/20/2007	04/04/2007

* * * * *

Panel Assignment: Not available

* * * * *

Robin Beaty, Austin MaKenzie and Jordan Beaty a minor by her next friend; Linda Barloon, William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon minors by her next friend,

Plaintiffs - Appellees

v.

Republic of Iraq,

Defendant - Appellant

United States of America,

Appellee

* * * * *

06/07/2007	MOTION filed (5 copies) by Appellees Robin Beaty, et al. (certificate of mail service dated 6/6/07) for summary affirmance [1045733-1]. Response due on 6/21/07.

* * * * *

06/14/2007	MOTION filed (5 copies) by Appellant Repub Iraq (certificate

	of mail service dated 6/14/07) to extend time to file [1047183-1] a response to a motion for summary affirmance [1045733-1] until 7/12/07.
06/20/2007	CLERK'S ORDER filed [1048445] granting motion extend time to respond to motion for summary affirmance filed in 07-7057; response to motion for summary affirmance now due 7/12/07; granting motion to extend time to respond to petition for leave to appeal filed in 07-8004; directing clerk to file the lodged response and ordering that upon filing of the petition for initial hearing en banc discussed in motion for an extension of time to respond to motion for summary affirmance in 07-7057, petition for initial hearing en banc will be presented to full court. If the petition is denied, matters pending in 07-7057 and 07-8004 will be set for consideration by the same panel. [Entry Date: 6/20/07] [07-7057, 07-8004]
06/20/2007	PER ABOVE ORDER lodged response [1048440-1] is filed.
06/20/2007	PER ABOVE ORDER lodged reply [1048442-1] is filed.
07/12/2007	SUGGESTION filed (19 copies) by

	Appellant Repub Iraq (certificate of service dated 7/12/07, by federal express overnight delivery) for hearing in banc [1053857-1]. [STYLED AS PETITION FOR INITIAL HEARING EN BANC].
07/12/2007	OPPOSITION filed [1053867-1] (5 copies) by Appellant Repub Iraq (certificate of service dated 7/12/07, by federal express overnight delivery) to a motion for summary affirmance [1045733-1].
	* * * * *
07/23/2007	RESPONSE (styled as "BRIEF FOR THE UNITED STATES AS AMICUS IN SUPPORT OF INITIAL HEARING EN BANC") filed [1057711-1] (5 copies) by USA (certificate of mail service dated 7/23/07).
07/25/2007	SUPPLEMENT (styled as "CORRECTED BRIEF FOR THE UNITED STATES AS AMICUS IN SUPPORT OF INITIAL HEARING EN BANC") to [1057712-1] response [1057711-1] filed by USA (with attached letter describing correction).
07/26/2007	MOTION filed (5 copies) by Appellees Robin Beaty, et al. (certificate of mail service dated 7/25/07) to strike [1057713-1]

	USA's brief in support of initial hearing en banc [1057711-1].
07/30/2007	REPLY filed [1057490-1] (5 copies) by Appellees Robin Beaty, et al. (certificate of mail service dated 7/24/07) to Appellant's response to the motion for summary affirmance [1045733-1].
08/01/2007	OPPOSITION (styled as "OPPOSITION TO APPELLEES' MOTION TO STRIKE BRIEF OF THE UNITED STATES IN SUPPORT OF INITIAL HEARING EN BANC OR, ALTERNATIVELY, MOTION FOR LEAVE TO FILE") filed [1058161-1] (5 copies) by Appellee USA (certificate of mail service dated 8/1/07) to Appellees' motion strike document [1057713-1]. MOTION filed, for leave to file [1058161-2] a response [1057711-1].
08/03/2007	OPPOSITION filed [1058931-1] (5 copies) by Appellant Repub Iraq (certificate of mail service dated 8/3/07) to Appellees' motion strike amicus brief for the United States [1057713-1].
11/06/2007	PER CURIAM ORDER, In Banc, filed [1078597] of the petition for initial hearing en banc, the motion to strike the brief of the United

	States, the oppositions thereto, and the alternative motion for leave to file the brief of the United States, it is ORDERED that the motion to strike the brief of the United States be denied [1057713-1]. It is FURTHER ORDERED that the motion for leave to file the brief of the United States be granted [1058161-2]. It is FURTHER ORDERED that the petition for initial hearing en banc be denied [1053857-1]. *Circuit Judges Brown and Kavanaugh would grant the petition for initial hearing en banc* Before Judges Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, Kavanaugh. [Entry Date: 11/6/07]
11/21/2007	PER CURIAM ORDER filed [1081679] granting motion for summary affirmance filed by Robin Beaty [1045733-1]. The Clerk is directed to withhold issuance of the mandate [1081679-1] pending disposition of any timely petition for rehearing. Before Judges Sentelle, Randolph, Brown. [Entry Date: 11/21/07]
12/18/2007	MOTION filed (5 copies) by Appellant Repub Iraq (certificate of service dated 12/18/07, by mail) to stay issuance of the mandate.

01/11/2008	CLERK'S ORDER filed [1091967] granting the motion to stay the mandate filed by Repub Iraq [1088505-1] until 2/19/08. [Entry Date: 1/11/08]
02/20/2008	LETTER filed by Appellant Repub Iraq informing the court of a petition for writ of certiorari filed in the Supreme Court. [1100780-1]. Certificate of service date 2/20/08.
02/26/2008	LETTER filed by Clerk of Supreme Court. A petition for a writ of certiorari in the above entitled case was filed on 2/19/08 and placed on the docket as case No. 07-1090. [1101270-1]. Certificate of service date 2/26/08.

APPENDIX B

General Docket
United States Court of Appeals for DC Circuit

Court of Appeals Docket #: 06-7175 **Nature of Suit:** 3890 Other Statutory Actions Simon, Robert, et al v. Repub Iraq, et al **Appeal From:** United States District Court for the District of Columbia	**Docketed:** 10/17/2006 **Termed:** 06/24/2008
Case Type Information: **1)** Civil Private **2)** Private **3)** -	
Originating Court Information: **District:** 0090-1 : 03cv00691 **Trial Judge:** Henry H. Kennedy, Junior, U.S. District Judge **Date Filed:** 03/18/2003 **Date Order/Judgment:** 09/07/2006 **Date NOA Filed:** 10/05/2006	**Lead:** 03cv00691
* * * * *	

Panel Assignment:
Panel: DHG DBS JRB
Date of Hearing: 10/12/2007 **Date of Decision:** 06/24/2008 **Date Completed:** 06/24/2008

* * * * *

Robert Simon; Francoise Simon; Roberto Alvarez; Robert Alvarez,

Plaintiffs - Appellants

v.

Republic of Iraq; Iraqi Intelligence Service; Saddam Hussein,

Defendants - Appellees

Ethel Hurst; Spencer Hurst; Mitchell Hurst; Sharon Hurst Duross; Mary Diamond; Gwennth Forde; Victoria Porter; Olga Husbands; Vernon Druses; Randolph Porter; James Mulroy,

Amici Curiae for Appellant

02/23/2007	CLERK'S ORDER filed [1024702] to consolidate cases [1024702-1]. [Entry Date: 2/23/07] [06-7175, 06-7178]

* * * * *

04/30/2007	MOTION lodged (5 copies) (certificate of mail service dated 4/27/07) to allow amicus curiae [1038116-1]. Motion filed by Ethel Hurst in 06-7175, Spencer Hurst in 06-7175, Mitchell Hurst in 06-7175, Sharon Hurst Duross in 06-7175, Mary Diamond in 06-7175, Gwennth Forde in 06-7175, Victoria Porter in 06-7175, Olga Husbands in 06-7175, Vernon Druses in 06-7175, Randolph Porter in 06-7175, and James Mulroy in 06-7175.
	* * * * *
05/07/2007	JOINT BRIEF filed by Appellant Robert Simon, et al. in 06-7175 and Nabil Seyam, et al. in 06-7178 [1039166-1]. Copies: 15. Certificate of personal service date 5/7/07. [06-7175, 06-7178]
05/07/2007	JOINT APPENDIX filed by Appellant Robert Simon, et al. in 06-7175 and Appellant Nabil Seyam, et al. in 06-7178. [1039167-1]. Copies: 10. Certificate of personal service date 5/7/07. [06-7175, 06-7178]
05/14/2007	BRIEF lodged by Movant-Amicus Curiae-Appellant Ethel Hurst, et al. in 06-7175 [1040600-1]. Copies: 15. Certificate of mail service date 5/11/07.
05/21/2007	CLERK'S ORDER filed [1041763] of

	the motion for leave to file motion to participate as amici curiae out of time, and the motion of Ethel Hurst, Spencer Hurst, Mitchell Hurst, Gwennth Forde, Victoria Porter, Olga Husbands, Vernon Druses, Randolph Porter, James Mulroy, Mary Diamond, and Sharon Duross to participate as amici curiae in support of appellants, and it appearing that motions are unopposed, it is ORDERED that the motion for leave to file be granted [1038593-1]. The Clerk is directed to file the lodged motion for leave to participate as amici curiae in support of appellants [1038116-1]. It is FURTHER ORDERED that the motion for leave to participate as amici curiae be granted [1038116-1]. The Clerk is directed to file the lodged brief [1040600-1]. It is FURTHER ORDERED the following revised briefing schedule will now apply [1041763-1]: Appellee's brief due on 6/11/07; Appellant's reply brief due on 6/25/07 in 06-7175. [Entry Date: 5/21/07] [06-7175, 06-7178]
	* * * * *
05/21/2007	PER ABOVE ORDER lodged amicus curiae brief [1040600-1] is filed.
06/18/2007	BRIEF filed by Appellee Repub Iraq

	in 06-7175 [1048192-1]. Copies: 15. Certificate of service date 6/18/07. [06-7175, 06-7178]
06/21/2007	SUPPLEMENT (errata - revised table of authorities) to [1050690-1] appellee's brief [1048192-1] filed by Appellee Repub Iraq in 06-7175.
07/02/2007	REPLY BRIEF lodged by Appellant Robert Simon in 06-7175, Appellant Francoise Simon in 06-7175, Appellant Roberto Alvarez in 06-7175, Appellant Robert Alvarez in 06-7175, Appellant Nabil Seyam in 06-7178, Appellant Ahmad Seyam in 06-7178, Appellant Yusef Seyam in 06-7178, Appellant Melissa Seyam in 06-7178, Appellant Carrie Seyam in 06-7178 [1051596-1]. Copies: 15. Certificate of mail service date 7/2/07. [06-7175, 06-7178]
07/06/2007	CORRECTED REPLY BRIEF filed by Appellant Robert Simon, et al. in 06-7175, Appellant Nabil Seyam, et al. in 06-7178 [1053324-1]. Copies: 15. Certificate of personal service date 7/6/07. [06-7175, 06-7178]
	* * * * *
10/12/2007	ORAL ARGUMENT HELD before Ginsburg, Sentelle, Brown. [06-7175, 06-7178]
	* * * * *

01/23/2008	MOTION lodged (5 copies) by Appellants Robert Simon, et al. in 06-7175, Nabil Seyam, et al. in 06-7178 (certificate of service dated 1/23/08, by hand-delivery) for summary reversal [1095618-1], or, in the alternative, to remand [1095618-2]. [06-7175, 06-7178]
	* * * * *
02/04/2008	PER CURIAM ORDER filed [1096994] directing the parties to file simultaneous briefs of no more than 15 pages by 2/19/08 at 4 p.m. addressing the effect upon this case, if any, of the new Act and of the President's waiver; All submissions must be served by hand (see order for specific details); Dismissing as moot motion for an extension of time filed time by Repub Iraq [1096768-1]. [1096994-1] Before Judges Ginsburg, Sentelle, Brown. [Entry Date: 2/4/08] [06-7175, 06-7178]
	* * * * *
03/14/2008	APPELLANT SUPPLEMENTAL BRIEF [1106318] filed by Robert Alvarez, Roberto Alvarez, Francoise Simon and Robert Simon in 06-7175, Susan El Jaonni, Islamic Society of Wichita, Ahmad Seyam, Carrie Seyam, Melissa Seyam and Yusef Seyam in 06-7178 [Service Date: 03/14/2008] Copies: 15 (Final Brief);

	Pages: 11-15; Disclosure Statement: Previously Filed; Certificate of Parties: Not Applicable to this Filing [06-7175, 06-7178]
03/14/2008	APPELLEE SUPPLEMENTAL BRIEF [1106326] filed by Saddam Hussein, Iraqi Intelligence Service and Republic of Iraq [Service Date: 03/14/2008] Copies: 15 (Final Brief); Pages: 11-15; Disclosure Statement: Previously Filed; Certificate of Parties: Not Applicable to this Filing [06-7175]
	* * * * *
06/24/2008	PER CURIAM JUDGMENT filed [1123355] that the judgment of the district court be reversed and remanded for further proceedings for the reasons in the accompanying opinion. Judge Sentelle, Ginsburg and Brown [06-7175, 06-7178]
06/24/2008	OPINION filed [1123357] (Pages: 20) for the Court by Judge Ginsburg [06-7175, 06-7178]
06/24/2008	CLERK'S ORDER filed [1123358] withholding issuance of the mandate. [06-7175, 06-7178]
07/24/2008	Relief Replaced - MOTION filed [1130219] by Republic of Iraq in 06-7175, 06-7178 to stay mandate in case (Response to Motion served by mail due on 08/08/2008) [Mail

	Service Date: 07/24/2008] Copies: 5 (Motion/Petition); Pages: 12; Word Count for Brief: not applicable; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing [06-7175, 06-7178]—[Edited 08/04/2008 by SMC]
08/08/2008	RESPONSE IN OPPOSITION FILED [1132922] by Robert Alvarez, Roberto Alvarez, Francoise Simon and Robert Simon to motion to stay mandate,[1130219-2] [Mail Service Date: 08/08/2008 US mail] Copies: 5 (Motion); Pages: 10; Word Count for Motion: not applicable; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing [06-7175]
08/18/2008	REPLY IN SUPPORT OF ITS MOTION TO STAY THE MANDATE FILED [1134208] by Republic of Iraq to response [1132922-2] [Mail Service Date: 08/18/2008] [06-7175]
08/26/2008	PER CURIAM ORDER filed [1135198] granting motion to stay mandate [1130219-2] Judge Sentelle, Ginsburg and Brown [06-7175, 06-7178]
09/16/2008	LETTER filed [1139246] by the Clerk of the Supreme Court of the United States notifying this court that the time for filing a petition for

	writ of certiorari has been extended to: 10/22/2008. [06-7175]
09/18/2008	LETTER filed [1139417] by the Clerk of the Supreme Court of the United States notifying this court that the time for filing a petition for writ of certiorari has been extended to: 10/22/2008. [06-7175]
09/22/2008	MOTION filed [1140102] by appellees Republic of Iraq, et al. in 06-7175, 06-7178 to extend time to stay the mandate through October 22, 2008. (Response to Motion served by mail due on 10/06/2008) [Service Date: 09/22/2008] Copies: 5 (Motion/Petition); Pages: 1-10; Disclosure Statement: Not Applicable to this Party; Certificate of Parties: Not Applicable to this Filing [06-7175, 06-7178]
10/14/2008	PER CURIAM ORDER filed [1143610] granting motion to extend time [1140102-2]. The mandate is hereby stayed until October 22, 2008. Judge Sentelle, Ginsburg and Brown [06-7175, 06-7178]
10/24/2008	LETTER filed [1146019] by the Clerk of the Supreme Court of the United States notifying this court of the following activity in the case before it: A petition for writ of certiorari was filed and placed on the docket as Supreme Court Case

	Number: 08-539, Filed Date: 10/22/2008. [06-7175]
11/06/2008	LETTER FILED [1148604] by Republic of Iraq in 06-7175, 06-7178 from attorney for Republic of Iraq requesting docket be updated regarding Supreme Court filing. [Service Date: 11/06/2008] [06-7175, 06-7178]

APPENDIX C

General Docket
United States Court of Appeals for DC Circuit

Court of Appeals Docket #: 06-7178 **Nature of Suit:** 3890 Other Statutory Actions Islam Scty Wichita, et al v. Repub Iraq, et al **Appeal From:** United States District Court for the District of Columbia	**Docketed:** 10/17/2006 **Termed:** 06/24/2008
Case Type Information: 1) Civil Private 2) Private 3) -	
Originating Court Information: **District:** 0090-1 : 03cv00888 **Trial Judge:** Henry H. Kennedy, Junior, U.S. District Judge **Date Filed:** 04/15/2003	**Lead:** 03cv00888
Date Order/Judgment: 09/07/2006	**Date NOA Filed:** 10/05/2006
* * * * *	

Panel Assignment: **Panel:** DHG DBS JRB **Date of Hearing:** 10/12/2007 **Date of Decision:** 06/24/2008 **Date Completed:** 06/24/2008
Islamic Society of Wichita; Susan El Jaonni, Executor of the Estate of Nabil Seyam; Ahmad Seyam; Yusef Seyam; Melissa Seyam; Carrie Seyam, Plaintiffs - Appellants v. Republic of Iraq; Iraqi Intelligence Service; Saddam Hussein, Defendants - Appellees

* * * * *	
02/23/2007	CLERK'S ORDER filed [1024702] to consolidate cases [1024702-1]. [Entry Date: 2/23/07] [06-7175, 06-7178]
* * * * *	

APPENDIX D

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-00215-JDB

BEATY et al v. REPUBLIC OF IRAQ
Assigned to: Judge John D. Bates
Case in other court: USCA-DC, 07-07057
Cause: 28:1331 Fed. Question: Personal Injury

Date Filed: 02/10/2003
Jury Demand: None
Nature of Suit: 360 P.I.: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
02/10/2003	1	COMPLAINT against REPUBLIC OF IRAQ (Filing fee $ 150.), filed by LINDA BARLOON, ROBIN BEATY. (Attachments: # 1 Exhibit A)(rje,) Modified on 2/22/2003 (rje,). (Entered: 02/12/2003)
		* * * * *
01/29/2004	4	ORDER INVITING the United States to file a statement of interest in the case; and SETTING a briefing schedule. Signed by Judge John D. Bates on

		1/29/04. (lcjdb1) (Entered: 01/29/2004)
		* * * * *
03/15/2004	5	STATEMENT of interest from UNITED STATES OF AMERICA. (Burgess, Joe) (Entered: 03/16/2004)
		* * * * *
04/14/2004	8	RESPONSE to *STATEMENT OF INTEREST OF THE UNITED STATES* filed by LINDA BARLOON, ROBIN BEATY. (Jones, Nelson) (Entered: 04/14/2004)
05/05/2004	9	REPLY *in Support of Statement of Interest* by UNITED STATES OF AMERICA. (Attachments: # 1)(Tannenbaum, Andrew) (Entered: 05/05/2004)
05/20/2004	10	RESPONSE to *Statement of Interest* filed by LINDA BARLOON, ROBIN BEATY. (Jones, Nelson) (Entered: 05/20/2004)
06/16/2004	11	NOTICE by ROBIN BEATY *Plaintiffs' Notice of Filing of Supplemental Authority* (Jones, Nelson) (Entered: 06/16/2004)
		* * * * *

05/23/2005	20	Third AMENDED COMPLAINT against REPUBLIC OF IRAQ filed by LINDA BARLOON, ROBIN BEATY.(lc,) (Entered: 05/23/2005)
* * * * *		
05/12/2006	24	MOTION to Dismiss *Plaintiffs' Third Amended Complaint* by REPUBLIC OF IRAQ. (Attachments: # 1 Text of Proposed Order)(Martin, Lawrence) (Entered: 05/12/2006)
06/12/2006	25	Memorandum in opposition to re 24 MOTION to Dismiss *Plaintiffs' Third Amended Complaint* filed by LINDA BARLOON, ROBIN BEATY. (Attachments: # 1 Text of Proposed Order Denying Motion to Dismiss)(Jones, Nelson) (Entered: 06/12/2006)
06/12/2006	26	MOTION for Summary Judgment by LINDA BARLOON, ROBIN BEATY. (Attachments: # 1 Exhibit Memorandum In Support of Summary Judgment Motion# 2 Exhibit Plaintiffs Statement of Undisputed Facts# 3 Exhibit Memorandum Opinion# 4 Text of Proposed Order Granting Summary Judgment)(Jones, Nelson) (Entered: 06/12/2006)
* * * * *		

09/22/2006	34	Memorandum in opposition to re 26 MOTION for Summary Judgment *and Reply in Support of Motion to Dismiss* filed by REPUBLIC OF IRAQ. (Attachments: # 1 Exhibit 1 - Presidential Determination 2003-23# 2 Exhibit 2 - Executive Order 13303# 3 Exhibit 3 - Message to the Congress (May 22, 2003)# 4 Exhibit 4 - Presidential Letter (Aug. 28, 2003)# 5 Text of Proposed Order)(Burgoyne, Robert) (Entered: 09/22/2006)
09/22/2006	35	ORDER INVITING the United States to file an updated or supplemental statement of interest in this case. Signed by Judge John D. Bates on 9/22/2006. (lcjdb1) (Entered: 09/22/2006)
* * * * *		
11/17/2006	39	RESPONSE TO ORDER OF THE COURT—*Third Statement of Interest of the United States* filed by UNITED STATES OF AMERICA. (Tannenbaum, Andrew) (Entered: 11/17/2006)
12/01/2006	40	RESPONSE re 39 Response to Order of the Court *(U.S. Statement of Interest)* filed by REPUBLIC OF IRAQ. (Burgoyne,

		Robert) (Entered: 12/01/2006)
		* * * * *
12/08/2006	42	REPLY *Memorandum in Support of Plaintiffs' 26 Motion for Summary Judgment* filed by LINDA BARLOON, ROBIN BEATY. (Jones, Nelson) Modified on 12/11/2006 (lc,). (Entered: 12/08/2006)
		* * * * *
03/20/2007	43	ORDER granting in part and denying in part 24 defendant's motion to dismiss, and granting in part and denying in part 26 plaintiffs' motion for partial summary judgment. Signed by Judge John D. Bates on 3/20/2007. (lcjdb1) (Entered: 03/20/2007)
03/20/2007	44	MEMORANDUM OPINION accompanying 43 Order granting in part and denying in part defendant's motion to dismiss, and granting in part and denying in part plaintiffs' motion for partial summary judgment. Signed by Judge John D. Bates on 3/20/2007. (lcjdb1) (Entered: 03/20/2007)
		* * * * *
04/03/2007	45	MOTION for Certification for

		interlocutory appeal *pursuant to 28 U.S.C. 1292(b)* by REPUBLIC OF IRAQ (Attachments: # 1 Text of Proposed Order)(Burgoyne, Robert) (Entered: 04/03/2007)
04/03/2007		MINUTE ORDER: Upon consideration of 45 Iraq's motion for certification of the Court's March 20, 2007 Memorandum Opinion and Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), it is hereby ORDERED that if the United States desires to submit a statement regarding Iraq's motion, it shall do so by not later than the deadline that LCvR 7(b) establishes for plaintiffs to file their opposition. SO ORDERED. Signed by Judge John D. Bates on 4/3/2007. (lcjdb1) (Entered: 04/03/2007)
04/04/2007	46	NOTICE OF APPEAL as to 44 Memorandum & Opinion, 43 Order on Motion to Dismiss, Order on Motion for Summary Judgment by REPUBLIC OF IRAQ. Filing fee $ 455, receipt number 1158749. Fee Status: Fee Paid. Parties have been notified. (Burgoyne, Robert) (Entered: 04/04/2007)
* * * * *		

04/16/2007		USCA Case Number 07-7057 for 46 Notice of Appeal, filed by REPUBLIC OF IRAQ. (lc,) (Entered: 04/17/2007)
04/17/2007	47	Memorandum in opposition to re 45 MOTION for Certification for interlocutory appeal *pursuant to 28 U.S.C. 1292(b)* filed by LINDA BARLOON, ROBIN BEATY. (Jones, Nelson) (Entered: 04/17/2007)
04/17/2007	48	RESPONSE TO ORDER OF THE COURT *Regarding Defendant's Motion for Certification Pursuant to 28 U.S.C. 1292(b)* filed by UNITED STATES OF AMERICA. (Tannenbaum, Andrew) (Entered: 04/17/2007)
* * * * *		
04/18/2007		MINUTE ORDER: Upon consideration of 49 plaintiffs' motion for an extension of time to file their response to 45 defendant's motion for certification for interlocutory appeal, it is hereby ORDERED that the motion is DENIED as unnecessary. See Fed. R. Civ. P. 6(e); Advisory Committee Notes on the 2005 Amendments. SO ORDERED. Signed by Judge John D. Bates on 4/18/2007. (lcjdb1)

		(Entered: 04/18/2007)
* * * * *		
04/19/2007	51	ORDER granting 45 defendant Iraq's motion to certify for interlocutory appeal 43 the March 20, 2007 Order denying its motion to dismiss. Signed by Judge John D. Bates on 4/19/2007. (lcjdb1) (Entered: 04/19/2007)

APPENDIX E

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-00691-HHK

SIMON et al v. REPUBLIC OF IRAQ et al
Assigned to: Judge Henry H. Kennedy
Lead case: 1:01-cv-02674-HHK
Member case: (View Member Case)
Case in other court: USCA-DC, 06-07175
Cause: 28:1602 Foreign Sovereign Immunities Act

Date Filed: 03/18/2003
Date Terminated: 09/12/2006
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

* * * * *

Date Filed	#	Docket Text
03/18/2003	1	COMPLAINT against SADDAM HUSSEIN, IRAQI INTELLIGENCE SERVICE, REPUBLIC OF IRAQ (Filing fee $ 150.) , filed by ROBERT ALVAREZ, ROBERTO ALVAREZ, FRANCOISE SIMON, ROBERT SIMON.

		(Attachments: # 1 Exhibit 1# 2 Affidavit 1)(mpt,) (Entered: 03/19/2003)
		* * * * *
09/14/2004	7	AMENDED COMPLAINT 1 against SADDAM HUSSEIN, IRAQI INTELLIGENCE SERVICE, REPUBLIC OF IRAQ filed by ROBERT ALVAREZ, ROBERTO ALVAREZ, FRANCOISE SIMON, ROBERT SIMON. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(nmw,) Modified on 9/16/2004 (lc,). (Entered: 09/14/2004)
		* * * * *
01/04/2005	14	MOTION to Dismiss *the First Amended Complaint* by REPUBLIC OF IRAQ, IRAQI INTELLIGENCE SERVICE. (Attachments: # 1 Exhibit 1)(Martin, Lawrence) (Entered: 01/04/2005)
		* * * * *
01/18/2005	16	Memorandum in opposition to motion re 14 *Dismiss* filed by ROBERT SIMON, FRANCOISE SIMON, ROBERTO ALVAREZ, ROBERT ALVAREZ. (Cavanaugh, Anthony)

		Attachment #1 Text of Proposed Order. Additional attachment(s) added on 1/19/2005 (lc,). (Entered: 01/18/2005)
* * * * *		
01/18/2005	18	MOTION for Leave to File a Brief Amicus Curiae by JAMES S. VINE. (Attachments: # 1 Proposed Amicus Brief# 2 Exhibit A to Brief# 3 Exhibit B to Brief# 4 Text of Proposed Order # 5 Certificate of Service)(lc,) (Entered: 01/24/2005)
* * * * *		
01/28/2005	20	REPLY to opposition to motion re 14 *(Motion to Dismiss)* filed by REPUBLIC OF IRAQ, IRAQI INTELLIGENCE SERVICE. (Martin, Lawrence) (Entered: 01/28/2005)
02/11/2005		MINUTE ENTRY: Court grants motion for leave to file amicus curiae brief 18. Signed by Judge James Robertson on February 11, 2005. (MT) (Entered: 02/11/2005)
02/11/2005	21	AMICUS BRIEF by JAMES S. VINE. (Attachments: # 1 Exhibit A# 2 Exhibit B)(lc,) (Entered: 02/14/2005)

03/22/2005	22	Unopposed MOTION to Consolidate Cases *Vine v. Republic Of Iraq And Seyam v. Republic Of Iraq With This Action* by JAMES S. VINE. (Attachments: # 1 Text of Proposed Order # 2 Tab A)(Wolf, Daniel) (Entered: 03/22/2005)
* * * * *		
05/06/2005		Cases associated. (lc,) (Entered: 05/23/2005)
* * * * *		
06/10/2005	25	REPLY to opposition to motion re 44 *Motion to Dismiss* filed by REPUBLIC OF IRAQ. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(Martin, Lawrence) (Entered: 06/10/2005)
* * * * *		
09/07/2006	29	Memorandum Opinion and Order. Signed by Judge Henry H. Kennedy, Jr., on September 7, 2006. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(FL,) (Entered: 09/07/2006)
09/07/2006	30	Judgment. Signed by Judge Henry H. Kennedy, Jr., on

		September 7, 2006. (FL,) (Entered: 09/07/2006)
10/05/2006	31	NOTICE OF APPEAL by ROBERT SIMON, FRANCOISE SIMON, ROBERTO ALVAREZ, ROBERT ALVAREZ. Filing fee $ 455, receipt number 1021381. Fee Status: Fee Paid. Parties have been notified. (Cavanaugh, Anthony) (Entered: 10/05/2006)
* * * * *		
10/17/2006		USCA Case Number 06-7175 for 31 Notice of Appeal filed by ROBERT SIMON, FRANCOISE SIMON, ROBERTO ALVAREZ,, ROBERT ALVAREZ,. (lc,) (Entered: 10/18/2006)
12/13/2006	32	ORDER of USCA (certified copy) as to 58 Notice of Appeal filed by REPUBLIC OF IRAQ; It is hereby ordered that the motion be granted and this case is hereby dismissed; USCA#06-7177 (jsc) (Entered: 01/23/2007)

APPENDIX F

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:03-cv-00888-HHK

SEYAM et al v. THE REPUBLIC OF IRAQ et al
Assigned to: Judge Henry H. Kennedy
Lead case: 1:01-cv-02674-HHK
Member case: (View Member Case)
Case in other court: USCA-DC, 06-07178
Cause: 28:1602 Foreign Sovereign Immunities Act

Date Filed: 04/15/2003
Date Terminated: 09/12/2006
Jury Demand: None
Nature of Suit: 890 Other Statutory Actions
Jurisdiction: Federal Question

* * * * *

Date Filed	#	Docket Text
04/15/2003	1	COMPLAINT against SADDAM HUSSEIN, THE IRAQI INTELLIGENCE SERVICE, THE REPUBLIC OF IRAQ (Filing fee $ 150.) , filed by AHMAD SEYAM, CARRIE SEYAM, MELISSA SEYAM, NABIL SEYAM,

		YUSEF SEYAM. (Attachments: # 1 Exhibit A# 2 Exhibit B)(rje,) (Entered: 04/16/2003)
* * * * *		
10/08/2004	11	AMENDED COMPLAINT against SADDAM HUSSEIN, THE IRAQI INTELLIGENCE SERVICE, THE REPUBLIC OF IRAQ filed by AHMAD SEYAM, CARRIE SEYAM, MELISSA SEYAM, NABIL SEYAM, YUSEF SEYAM. (Attachments: # 1 Exhibit A# 2 Exhibit B# 3 Exhibit C)(td,) (Entered: 10/22/2004)
* * * * *		
12/13/2004	15	NOTICE *OF RELATED CASE* by AHMAD SEYAM, CARRIE SEYAM, MELISSA SEYAM, NABIL SEYAM, YUSEF SEYAM (Smyth, David) (Entered: 12/13/2004)
* * * * *		
12/28/2004	17	NOTICE OF RELATED CASE by CARRIE SEYAM, NABIL SEYAM, AHMAD SEYAM, YUSEF SEYAM, MELISSA SEYAM. Case related to Case No. 01-2674. (lc,) (Entered: 12/28/2004)

01/04/2005	18	MOTION to Dismiss *the Second Amended Complaint* by THE REPUBLIC OF IRAQ, THE IRAQI INTELLIGENCE SERVICE. (Attachments: # 1 Exhibit 1)(Martin, Lawrence) (Entered: 01/04/2005)
* * * * *		
01/18/2005	20	Memorandum in opposition to motion re 18 *dismiss* filed by CARRIE SEYAM, NABIL SEYAM, AHMAD SEYAM, YUSEF SEYAM, MELISSA SEYAM. (Smyth, David) (Entered: 01/18/2005)
01/18/2005	21	Proposed MOTION for Order *denying Defendants' Motion to Dismiss* by CARRIE SEYAM, NABIL SEYAM, AHMAD SEYAM, YUSEF SEYAM, MELISSA SEYAM. (Smyth, David) (Entered: 01/18/2005)
01/21/2005	22	MOTION for Leave to File a Brief Amicus Curiae by JAMES S. VINE. (Attachments: # 1 Certificate of Service# 2 Text of Proposed Order # 3 Proposed Brief Amicus Curiae# 4 Exhibit A to Brief# 5 Exhibit B to Brief)(lc,) (Entered: 01/25/2005)

* * * * *		
01/27/2005		MINUTE ORDER granting 22 Motion for Leave to File Brief Amicus Curiae. Signed by Judge Reggie B. Walton on 1/27/05. (lcrbw1,) (Entered: 01/27/2005)
* * * * *		
01/27/2005	26	AMICUS BRIEF in opposition to defendants motion to dismiss re 18 by JAMES S. VINE. (td,) (Entered: 02/08/2005)
01/28/2005	24	REPLY to opposition to motion re 18 *(Motion to Dismiss)* filed by THE REPUBLIC OF IRAQ, THE IRAQI INTELLIGENCE SERVICE. (Martin, Lawrence) (Entered: 01/28/2005)
* * * * *		
03/22/2005	29	Unopposed MOTION to Consolidate Cases *Vine v. Republic Of Iraq And Simon v. Republic Of Iraq* by JAMES S. VINE. (Attachments: # 1 Text of Proposed Order)(Wolf, Daniel) (Entered: 03/22/2005)
* * * * *		
05/06/2005		MINUTE ORDER granting 29

		Unopposed MOTION to Consolidate Cases Vine v. Republic Of Iraq And Simon v. Republic Of Iraq and 30 Motion to Stay. (Kennedy, Henry) (Entered: 05/06/2005)
05/06/2005		Cases associated. (lc,) (Entered: 05/23/2005)
* * * * *		
06/10/2005	31	REPLY to opposition to motion re 44 *Motion to Dismiss* filed by REPUBLIC OF IRAQ. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(Martin, Lawrence) (Entered: 06/10/2005)
* * * * *		
09/07/2006	35	Memorandum Opinion and Order. Signed by Judge Henry H. Kennedy, Jr., on September 7, 2006. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(FL,) (Entered: 09/07/2006)
09/07/2006	36	Judgment. Signed by Judge Henry H. Kennedy, Jr., on September 7, 2006. (FL,) (Entered: 09/07/2006)

10/05/2006	37	NOTICE OF APPEAL by CARRIE SEYAM, NABIL SEYAM, AHMAD SEYAM, YUSEF SEYAM, MELISSA SEYAM. Filing fee $ 455, receipt number 1021396. Fee Status: Fee Paid. Parties have been notified. (Cavanaugh, Anthony) (Entered: 10/05/2006)
* * * * *		
10/17/2006		USCA Case Number 06-7178 for 37 Notice of Appeal filed by NABIL SEYAM, AHMAD SEYAM,, YUSEF SEYAM,, MELISSA SEYAM, CARRIE SEYAM,. (lc,) (Entered: 10/18/2006)
12/13/2006	38	ORDER of USCA (certified copy) as to 58 Notice of Appeal filed by REPUBLIC OF IRAQ; It is hereby ordered that the motion be granted and this case is hereby dismissed; USCA#06-7177 (jsc) (Entered: 01/23/2007)

APPENDIX G

U.S. District Court
District of Columbia (Washington, DC)
CIVIL DOCKET FOR CASE #: 1:01-cv-02674-HHK

VINE, et al v. REPUBLIC OF IRAQ, et al
Assigned to: Judge Henry H. Kennedy
Demand: $5,000,000,000
Member case: (View Member Case)
Case in other court: USCA-DC, 06-07177
Cause: 28:1602 Foreign Sovereign Immunities Act

Date Filed: 12/27/2001
Jury Demand: None
Nature of Suit: 360 P.I.: Other
Jurisdiction: Federal Question

* * * * *

Date Filed	#	Docket Text
* * * * *		
08/29/2003	24	STATEMENT filed UNITED STATES , regarding: lack of subject matter jurisdiction.; exhibits (3); "LEAVE TO FILE GRANTED" by Judge Kennedy. (bcs) (Entered: 09/03/2003)

09/02/2003	25	RESPONSE by plaintiffs to statement of interest of the United States regarding lack of subject matter jurisdiction [24-1] (bcs) (Entered: 09/04/2003)
* * * * *		
09/22/2003	26	RESPONSE by plaintiffs to statement of interest of the United States regarding lack of subject matter jurisdiction [24-1]; exhibit (1) (bcs) (Entered: 09/23/2003)
10/02/2003	27	REPLY by UNITED STATES in support of its statement of interest regarding lack of subject matter jurisdiction [24-1].; exhibit (1) (bcs) (Entered: 10/03/2003)
* * * * *		
07/20/2004	30	Memorandum and Order. Signed by Judge Henry H. Kennedy, Jr., on July 20, 2004. (FL,) (Entered: 07/20/2004)
* * * * *		
02/25/2005	42	THIRD AMENDED COMPLAINT against REPUBLIC OF IRAQ, SADDAM HUSSEIN filed by ROBERT FREDERICK CAMERON, DERIN CAMERON, JOSEPH

		MARLEE CAMERON, SARAH NILE CAMERON, JOHN O'NEIL GERALD, JOHN THOMAS GORDON, ELMILOUDI HAMID, ROBIN HAMID, CHARLES HODDE, ORMON M. KEATHLEY, JAMES S. VINE, CHARLES P. KEEGAN, J. CRAWFORD KERR, THOMAS LITRENTA, G. SCOTT MINDRUM, ANTHONY MIRELES, ELEANOR MIRELES, MARIA MIRELES, MIRIAM PRABHAKAR, EMMANUEL PRABHAKAR, JOSHUA PRABHAKAR, DONNA VINE, STEPHEN PRABHAKAR, OSAMA SHOUFI, JONI SHOUFI, EMIL SKODEN, DOROTHEA SKODEN, CATHERINE SKODEN, FELIPE ALAYON, CONCEPCION ALAYON, MICHAEL ANTONELLI, JOHN ALEXANDER, ALFRED E. ALLEN, KERRY E.N. ALLEN, SHAWN K.N. ALLEN, FRANCIA MANCERA ANDRE, GERALD W. ANDRE, KEITH SHANE BODIFORD, HEIDI BRILL-EDWARDS, BETTY JEAN BRYANT, MICHAEL CAPPS, MAE ANTONELLI, JAMES E. CARROLL,

		SHIRLEY R. CARROLL, ALL PLAINTIFFS, ALLEN ANTONELLI, TANIA ANTONELLI, MICHAEL C. BENDER, MARY A. BENDER, TIMOTHY P. BENDER.(lc,) (Entered: 02/28/2005)
		* * * * *
03/07/2005	44	MOTION to Dismiss by REPUBLIC OF IRAQ. (Attachments: # 1 Exhibit 1 (Original Complaint in Hill v. Republic of Iraq)# 2 Exhibit 2 (First Amended Complaint in Hill v. Republic of Iraq))(Martin, Lawrence) (Entered: 03/07/2005)
		* * * * *
03/22/2005	46	Memorandum in opposition to motion re 44 *Plaintiff's Memorandum In Opposition To Defendant's Motion To Dismiss* filed by ALL PLAINTIFFS. (Attachments: # 1 Tab A# 2 Tab B# 3 Tab C)(Wolf, Daniel) (Entered: 03/22/2005)
03/22/2005	47	MOTION to Consolidate Cases *Seyam v. Republic Of Iraq And Simon v. Republic Of Iraq With This Action* by ALL PLAINTIFFS. (Attachments: # 1 Text of Proposed Order)(Wolf,

		Daniel) (Entered: 03/22/2005)
* * * * *		
05/06/2005		MINUTE ORDER granting 47 MOTION to Consolidate Cases Seyam v. Republic Of Iraq And Simon v. Republic Of Iraq With This Action for purpose of deciding pending motions to dismiss. (Kennedy, Henry) (Entered: 05/06/2005)
05/06/2005		Cases associated. (lc,) (Entered: 05/23/2005)
* * * * *		
06/10/2005	53	REPLY to opposition to motion re 44 *Motion to Dismiss* filed by REPUBLIC OF IRAQ. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(Martin, Lawrence) (Entered: 06/10/2005)
06/17/2005	54	MOTION for Leave to File *Sur-Reply in Further Opposition to Iraq's Motion to Dismiss Plaintiffs' Third Amended Complaint* by ROBERT FREDERICK CAMERON, DERIN CAMERON, JOSEPH MARLEE CAMERON, SARAH NILE CAMERON, JOHN O'NEIL GERALD, JOHN

		THOMAS GORDON, ELMILOUDI HAMID, ROBIN HAMID, CHARLES HODDE, ORMON M. KEATHLEY, JAMES S. VINE, CHARLES P. KEEGAN, J. CRAWFORD KERR, THOMAS LITRENTA, G. SCOTT MINDRUM, ANTHONY MIRELES, ELEANOR MIRELES, MARIA MIRELES, MIRIAM PRABHAKAR, EMMANUEL PRABHAKAR, JOSHUA PRABHAKAR, DONNA VINE, STEPHEN PRABHAKAR, OSAMA SHOUFI, JONI SHOUFI, EMIL SKODEN, DOROTHEA SKODEN, CATHERINE SKODEN, FELIPE ALAYON, CONCEPCION ALAYON, MICHAEL ANTONELLI, JOHN ALEXANDER, ALFRED E. ALLEN, KERRY E.N. ALLEN, SHAWN K.N. ALLEN, FRANCIA MANCERA ANDRE, GERALD W. ANDRE, KEITH SHANE BODIFORD, HEIDI BRILL-EDWARDS, BETTY JEAN BRYANT, MICHAEL CAPPS, MAE ANTONELLI, JAMES E. CARROLL, SHIRLEY R. CARROLL, ALL PLAINTIFFS, ALLEN ANTONELLI, TANIA

		ANTONELLI, MICHAEL C. BENDER, MARY A. BENDER, TIMOTHY P. BENDER. (Attachments: # 1 Proposed Order# 2 Plaintiffs' Sur-Reply in Further Opposition to Iraq's Motion to Dismiss Plaintiffs' Third Amended Complaint# 3 Certificate of Service)Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(Wolf, Daniel) (Entered: 06/17/2005)
06/20/2005		Minute order granting 54 plaintiffs' unopposed motion for leave to file sur-reply in further opposition to Iraq's motion to dismiss plaintiffs' third amended complaint. Plaintiffs' sur-reply in further opposition to Iraq's motion to dismiss is deemed filed. Signed by Judge Henry H. Kennedy, Jr., on June 20, 2005. Official paperless order Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(FL,) (Entered: 06/20/2005)
06/20/2005	55	SURREPLY to re 44 MOTION to Dismiss filed by ALL PLAINTIFFS. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(lc,) (Entered:

		06/21/2005)
09/07/2006	56	Memorandum Opinion and Order. Signed by Judge Henry H. Kennedy, Jr., on September 7, 2006. Associated Cases: 1:01-cv-02674-HHK,1:03-cv-00691-HHK,1:03-cv-00888-HHK(FL,) (Entered: 09/07/2006)
* * * * *		
10/06/2006	58	NOTICE OF APPEAL as to 30 Memorandum & Opinion, 56 Memorandum & Opinion by REPUBLIC OF IRAQ. Filing fee $ 455, receipt number 139152. Fee Status: Fee Paid. Parties have been notified. (lc,) (Entered: 10/10/2006)
* * * * *		
12/13/2006	63	ORDER of USCA (certified copy) as to 58 Notice of Appeal filed by REPUBLIC OF IRAQ; It is hereby ordered that the motion be granted and this case is hereby dismissed; USCA#06-7177 (jsc) (Entered: 01/23/2007)
* * * * *		

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JORDAN BEATY, AUSTIN MAKENZIE BEATY, a minor by her next friend ROBIN BEATY, 5500 Stonegate Lane, Mustang, Oklahoma 73064 WILLIAM R. BARLOON, 3633 Van Buren, Virginia Beach, Virginia 23452 BRYAN C. BARLOON and REBECCA L. BARLOON, a minor by her next friend, LINDA BARLOON, 2250 Spanish Moss, Jacksonville, Florida 32246 Plaintiffs vs. REPUBLIC OF IRAQ Defendant	FILED FEB 10 2003 CASE NUMBER 1:03CV00215 JUDGE: John D. Bates DECK TYPE: Personal Injury/Malpractice DATE STAMP: 02/10/2003

PLAINTIFFS' COMPLAINT

COME NOW THE PLAINTIFFS, and each of them, and for cause of action against Defendant

REPUBLIC OF IRAQ, complain and allege as follows:

JURISDICTION

1. Jurisdiction arises pursuant to 28 U.S.C. Section 1605 (a)(7), as amended. Plaintiffs have previously offered to arbitrate pursuant to international rules of arbitration pursuant to 28 U.S.C. 1605(a)(7). A copy of such Offer to Arbitrate is attached hereto and filed contemporaneously. This Court has subject matter and personal jurisdiction over Defendant.

PARTIES

2. Plaintiffs Jordan Beaty and Austin Makensie Beaty are the daughters of Kenneth Beaty and Robin Beaty, plaintiffs and judgment creditors in David Daliberti v. Republic of Iraq, Cause No. 96CV01118, reduced to judgment at 146 F.Supp.2d 19 (D.C.D 2001), (hereinafter the "***Daliberti*** case"). Plaintiffs William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are the children of William Barloon and Linda Barloon are plaintiffs and judgment creditors in David Daliberti v. Republic of Iraq, Cause No. 96CV01118, the ***Daliberti*** case. Plaintiffs Jordan Beaty and Austin Makensie Beaty are residents of the State of Oklahoma. Plaintiffs William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are residents of the State of Florida. All Plaintiffs are citizens of the United States.

3. Defendant Republic of Iraq is a foreign sovereign whose activities herein were outside the scope of immunity provided by the Foreign Sovereign Immunities Act. Defendant Republic of Iraq is a designated terrorist nation as that term is defined in the Foreign Sovereign Immunities Act as amended.

* * * * *

WHEREFORE, Plaintiffs, and each of them as specified herein, respectfully request the following relief:

1. General, specific and compensatory damages in the amount of $565,800.00 to Jordan Beaty;

2. General, specific and compensatory damages in the amount of $565,800.00 to Robin Beaty as next friend for Austin Makensie Beaty;

3. General, specific and compensatory damages in the amount of $347,760 to William R. Barloon;

4. General, specific and compensatory damages in the amount of $347,760 to Bryan C. Barloon;

5. General, specific and compensatory damages in the amount of $347,760 to Linda Barloon as next friend for Rebecca Barloon;

6. Costs of this suit; and

7. Any further relief which the Court deems just and proper.

Respectfully submitted,

Andrew C. Hall
Florida Bar #111480
Penthouse, 1428
Brickel
Miami, Florida 33131
(305) 374-5030
(305) 374-5033 – Fax

Nelson M. Jones, III
D.C. Bar # 320266
440 Louisiana, Suite
625
Houston, Texas 77002
(713) 224-5323
(713) 224-8525

James Cooper-Hill
Texas Bar # 04789300
1723 Cherry Street
Rockport, Texas 78382
(361) 729-3566
(361) 729-7120

APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT SIMON 34B Ha'kivma Street Herzylia Pituah, Israel, FRANÇOISE SIMON 34B Ha'kivma Street Herzylia Pituah, Israel, ROBERTO ALVAREZ 2634 SW 4th Avenue Miami, FL 33129, ROBERT ALVAREZ c/o Roberto Alvarez 2634 SW 4th Avenue Miami, FL 33129 Plaintiffs, v. THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, THE IRAQI INTELLIGENCE SERVICE c/o Ministry of Foreign Affairs, Baghdad, Republic of Iraq, and SADDAM HUSSEIN in his official capacity as PRESIDENT OF THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, Defendants.	FILED MAR 18 2003 CASE NUMBER: 1:03CV00691 JUDGE: James Robertson DECK TYPE: General Civil DATE STAMP: 03/18/2003 **COMPLAINT**

COMPLAINT FOR DAMAGES

Plaintiffs, Americans taken hostage and tortured by the Republic of Iraq during the Gulf War, and their principally affected family members, bring this action against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity as President of Iraq. This action is for the personal injury caused to the plaintiffs as a result of being seized, held hostage, and tortured while held by Iraq in Kuwait and Iraq, and for the personal injury to their family members caused by these acts against their loved ones. Plaintiffs seek redress for personal injury, emotional distress, economic damages, pain and suffering, and solatium, and punitive damages to prevent future hostage taking and torture of Americans. Plaintiffs, as and for their Complaint, allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1605-1607 of that title, including particularly 28 U.S.C. § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, *as amended*, ("FSIA"), which provides a general exception from immunity of a foreign state for any case in which money damages are sought for personal injury caused by an act of torture, hostage taking, or the provision of material support or resources for such act by an official, employee, or agent of a state designated as a state sponsor of terrorism at the time the illegal acts occurred. Relevant to this provision, the Republic of Iraq was designated as a state sponsor of terrorism by the Department of State on September 13, 1990,

following its invasion of Kuwait, prior to its hostage taking and torture of these Americans by Iraqi military and intelligence officials under the direct guidance and control of Saddam Hussein, during the Persian Gulf War. The Republic of Iraq was so designated throughout the period in which the acts complained of in this Complaint occurred, and it remains so designated.

2. Further, all claimants in this action are nationals of the United States, and the Defendants in this action have been afforded a reasonable opportunity to arbitrate the claims detailed herein for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration. A copy of correspondence affording Defendants this opportunity is attached hereto at Tab A. A further offer to enter into such arbitration concerning the claims herein for acts occurring in the Republic of Iraq in lieu of prosecution of the claims in this action has been filed with the Complaint and is attached hereto at Tab B.

3. This action, brought pursuant to 28 U.S.C. §§ 1330 & 1602-11 of the FSIA, is filed within the limitation period for actions under 28 U.S.C. § 1605(a)(7), as set out in § 1605(f). The Government of the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity as President of the Republic of Iraq, were immune from suit in this action prior to the 1996 Amendments to the FSIA by the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1241 (1996), which added § 1605(a)(7) to the FSIA. As such, the limitation period is tolled until effective enactment of these amendments on April 24, 1996, and the ten-year limitation period begins in that

month and year and runs until April 2006. Further, the 1996 Amendments adding § 1605(a)(7) were specifically made retroactively applicable by Congress to "any cause of action arising before, on, or after the date of the enactment of this Act." *See* P.L. 104-132, § 221(c), 110 Stat. 1243 (April 24, 1996), *reprinted at* 28 U.S.C.A. § 1605 note.

4. Venue is properly in this district pursuant to 28 U.S.C. § 1391(f)(4) because Defendants are "foreign states" as defined by 28 U.S.C. § 1603(a) & (b). Defendant the Republic of Iraq is a foreign state and, as such, is a "foreign state" as defined by 28 U.S.C. § 1603(a). Defendants the Iraqi Intelligence Service and Saddam Hussein, in his official capacity as President of the Republic of Iraq, are "agencies or instrumentalities of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, are also "foreign states" within the meaning of 28 U.S.C. § 1603(a).

* * * * *

PLAINTIFFS

13. Plaintiff Robert Simon is a United States citizen, who resides in Herzylia Pituah, Israel. He was taken hostage by Iraq on January 21, 1991, and continued to be held hostage by Iraq until his release on March 2, 1991.

14. Plaintiff Françoise Simon is a United States citizen, who resides in Herzylia Pituah, Israel. She is the spouse of Robert Simon, and was his spouse throughout his period of captivity.

15. Plaintiff Roberto Alvarez is a United States citizen, and a resident of the State of Florida. He was taken hostage by Iraq on January 21, 1991, and continued to be held hostage by Iraq until his release on March 2, 1991.

16. Plaintiff Robert Alvarez is a United States citizen, and a resident of the State of Florida. He is the adult son of Roberto Alvarez.

DEFENDANTS

17. Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603, whose activities of torture and resulting tortious personal injury of American hostages and their families as set forth in this Complaint are within the exceptions to jurisdictional immunity of a foreign state pursuant to the FSIA. Its officials, employees, and agents carried out the torture and related mistreatment of the American hostages under the direction of Saddam Hussein while acting within the scope of their office, employment, or agency. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the hostage taking, torture, and related harm to the American hostages and their family members.

18. Defendant the Iraqi Intelligence Service is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. The Service and its officials and employees are officials, employees, or agents of the Republic of Iraq who participated in and provided material support and resources to the acts of hostage taking, torture, and related harm to the American hostages and their family members.

19. Defendant Saddam Hussein, President of Iraq, is an "official" of Iraq within the meaning of § 1605(a)(7). Similarly, for purposes of § 1605(a)(7), he is also an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such,

is a "foreign state" within the meaning of § 1603. Saddam Hussein is the President, and dictator, of a single-party totalitarian state and is simultaneously the Head of the State, the Chair of the Governing Council, the Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other agencies and instrumentalities of Iraq. As President of Iraq during the relevant time period of hostage taking, torture, and related harm to the American hostages and their family members, Defendant Saddam Hussein is responsible for these injuries while acting within the scope of his office. He is sued in his official capacity as President of Iraq, an office he continues to hold at the time filing of this Complaint. In that office, he had both direct command responsibility for the torture and related mistreatment of American hostages taken in Kuwait and Iraq, and responsibility for provision of material support to such acts by Iraqi forces. Further, all of the assets of Iraq are ultimately subject to the direction and control of Defendant Saddam Hussein.

* * * * *

RELIEF REQUESTED

53. **WHEREFORE**, Plaintiffs, as determined by their individual facts as specified herein, and in recognition of the depraved and outrageous conduct of the Defendants, respectfully request the following relief to be entered against all Defendants, The Republic of Iraq, the Iraqi Intelligence Service, and President Saddam Hussein, in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) General and specific compensatory damages (including pain and suffering) in excess of Fifteen Million Dollars ($15,000,000.00) as to each Plaintiff Robert Simon and Roberto Alvarez;

(b) General and specific compensatory damages (including solatium) in excess of Three Million Dollars ($3,000,000.00) as to each Plaintiff Françoise Simon and Robert Alvarez;

(c) Costs of this suit;

(d) Reasonable attorneys' fees; and

(e) Such further relief as the Court may deem just and proper.

54. **PLAINTIFFS FURTHER RESPECTFULLY REQUEST** the following additional relief to be entered against Defendants, the Iraqi Intelligence Service, and President Saddam Hussein in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) Punitive damages in excess of One Hundred Million Dollars ($100,000,000.00), to be shared equally between all Plaintiffs; and

(b) Such further relief as the Court may deem just and proper.

Respectfully submitted,
Stephen A. Fennell
D.C. Bar # 290379
1330 Connecticut Avenue N.W.
Washington, D.C. 20046-1795
(202) 429-8082
(202) 429-3902 – fax

Attorney for the Plaintiffs

Dated March 18, 2003

APPENDIX J

UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NABIL SEYAM
9405 East Lakepoint
Wichita, KS 67226,
AHMAD SEYAM
9405 East Lakepoint
Wichita, KS 67226,
YUSEF SEYAM
9405 East Lakepoint
Wichita, KS 67226,
MELISSA SEYAM
2357 N. Rutland Court
Wichita, KS 67226,
CARRIE SEYAM
7650 East 32nd Street North, Apt. 307 Wichita, KS 67226
Plaintiffs, v.
THE REPUBLIC OF IRAQ
c/o Ministry of Foreign Affairs
Baghdad, Republic of Iraq
THE IRAQI INTELLIGENCE SERVICE c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, and SADDAM HUSSEIN in his official capacity as PRESIDENT OF THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq,
Defendants.

FILED
APR 14 2003

COMPLAINT

CASE NUMBER 1:03CV00888
JUDGE: Reggie B. Walton
DECK TYPE: General Civil
DATE STAMP: 4/15/2003

COMPLAINT FOR DAMAGES

Plaintiff, Nabil Seyam, an American taken hostage by the Republic of Iraq just before the first Gulf War, and some of his family members bring this action against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity as President of Iraq. This action is for the personal injury caused to the plaintiffs as a result of being seized, held hostage and tortured while held by Iraq in Kuwait and Iraq, and for the personal injury to Seyam's family members caused by these acts. Plaintiffs seek redress for personal injury, emotional distress, economic damages, pain and suffering, and solatium, and punitive damages to prevent future hostage taking and torture of Americans. Plaintiffs, as and for their Complaint, allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1605-1607 of that title, including particularly 28 U.S.C. § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, as amended, ("FSIA"), which provides a general exception from immunity of a foreign state for any case in which money damages are sought for personal injury caused by an act of torture, hostage taking, or the provision of material support or resources for such acts by an official, employee, or agent of a state designated as a state sponsor of terrorism at the time the illegal acts occurred. Relevant to this provision, the Republic of Iraq was designated as a state sponsor of terrorism by the Department of State on September 13, 1990, following its invasion of Kuwait, prior to its hostage

taking and torture of Seyam by Iraqi military and intelligence officials under the direct guidance and control of Saddam Hussein. The Republic of Iraq was so designated throughout the period in which the acts complained of in this Complaint occurred and it remains so designated.

2. Further, all claimants in this action are nationals of the United States, and the Defendants in this action have been afforded a reasonable opportunity to arbitrate the claims detailed herein for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration. A copy of correspondence affording Defendants this opportunity is attached hereto at Tab A. An offer to enter into arbitration for claims for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration has been filed with this Complaint and is attached hereto at Tab B.

3. This action, brought pursuant to 28 U.S.C. §§ 1330 & 1602-11 of the FSIA, is filed within the limitation period for actions under 28 U.S.C. § 1605(a)(7), as set out in § 1605(f). The Government of the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his official capacity as the President of the Republic of Iraq, were immune from suit in this action prior to the 1996 Amendments to the FSIA by the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1241 (1996), which added § 1605(a)(7) to the FSIA. As such, the limitation period is tolled until effective enactment of these amendments on April 24, 1996, and the ten-year limitation period begins in that month and year and runs until April 2006. Further, the 1996 Amendments added § 1605(a)(7) were

specifically made retroactively applicable by Congress to "any cause of action arising before, on, or after the date of the enactment of this Act." *See* P.L. 104-132, § 221(c), 110 Stat. 1243 (April 24, 1996), *reprinted at* 28 U.S.C.A. § 1605 note.

4. Venue is properly in this district pursuant to 28 U.S.C. § 1391(f)(4) because Defendants are "foreign states" as defined by 28 U.S.C. § 1603(a) and (b). Defendant the Republic of Iraq is a foreign state and, as such, is a "foreign state" as defined by 28 U.S.C. § 1603(a). Defendants the Iraqi Intelligence Service and Saddam Hussein, in his official capacity as President of the Republic of Iraq, are "agencies or instrumentalities of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, are also "foreign states" within the meaning of 28 U.S.C. § 1603(a).

* * * * *

PLAINTIFFS

13. Plaintiff Nabil Seyam is a United States citizen, who resides in Wichita, Kansas. He was taken hostage by Iraq on October 1, 1990, and continued to be held hostage by Iraq until his release on October 19, 1990.

14. Plaintiff Melissa Seyam is a United States citizen, and a resident of the State of Kansas. She is the daughter of Nabil Seyam.

15. Plaintiff Ahmad Seyam is a United States citizen, and a resident of the State of Kansas. He is the son of Nabil Seyam.

16. Plaintiff Yusef Seyam is a United States citizen, and a resident of the State of Kansas. He is the son of Nabil Seyam.

17. Plaintiff Carrie Seyam is a United States citizen, and a resident of the State of Kansas. She is the former spouse of Nabil Seyam.

DEFENDANTS

18. Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603, whose activities of torture and resulting tortious personal injury of American hostages and their families as set forth in this Complaint are within the exceptions to jurisdictional immunity of a foreign state pursuant to the FSIA. Its officials, employees, and agents carried out the torture and related mistreatment of Nabil Seyam under the direction of Saddam Hussein while acting with the scope of their office, employment, or agency. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the hostage taking, torture, and related harm to Seyam and his family members.

19. Defendant the Iraqi Intelligence Service is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. The Service and its officials and employees are officials, employees, or agents of the Republic of Iraq who participated in and provided material support and resources to the acts of hostage taking, torture, and related harm to Seyam and his family members.

20. Defendant Saddam Hussein, President of Iraq, is an "official" of Iraq within the meaning of § 1605(a)(7). Similarly, for purposes of § 1605(a)(7), he is also an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. Saddam Hussein is the President, and dictator, of a

single-party totalitarian state and is simultaneously the Head of the State, the Chair of the Governing Council, the Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other agencies and instrumentalities of Iraq. As President of Iraq during the relevant time period of hostage taking, torture, and related harm to Seyam and his family members, Defendant Saddam Hussein is responsible for these injuries while acting within the scope of his office. He is sued in his official capacity as President of Iraq. In that office, he has both direct command responsibility for the torture and related mistreatment of American hostages taken in Kuwait and Iraq, and responsibility for provision of material support to such acts by Iraqi forces. Further, all of the assets of Iraq are ultimately subject to the direction and control of Defendant Saddam Hussein.

* * * * *

RELIEF REQUESTED

52. **WHEREFORE**, Plaintiffs, as determined by their individual facts as specified herein, and in recognition of the depraved and outrageous conduct of Defendants, respectfully request the following relief to be entered against all Defendants, The Republic of Iraq, the Iraqi Intelligence Service, and President Saddam Hussein, in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) General and specific compensatory damages (including pain and suffering) in excess of Three Million Dollars ($3,000,000.00) as to Plaintiff Nabil Seyam;

(b) General and specific compensatory damages (including solatium) in excess of One Million Dollars ($1,000,000.00) as to each Plaintiff Ahmad Siam, Amenha Seyam, Ahmad Seyam, Anisa Seyam, Melissa Seyam, Yusef Seyam, and Carrie Seyam;

(c) Costs of this suit;

(d) Reasonable attorneys' fees; and

(e) Such further relief as the Court may deem just and proper.

53. **PLAINTIFFS FURTHER RESPECTFULLY REQUEST** the following additional relief to be entered against Defendants, the Iraqi Intelligence Service, and President Saddam Hussein in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) Punitive damages in excess of One Hundred Million Dollars ($100,000,000.00), to be shared equally between all Plaintiffs; and

(b) Such further relief as the Court may deem just and proper.

Respectfully submitted,

Stephen A. Fennell (290379)
David D. Smyth III (475972)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000 – phone
(202) 429-3902 – fax
Attorneys for the Plaintiffs

Dated April 15, 2003

APPENDIX K

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, *et al.*,	
Plaintiffs,	
v.	Civil Action No.
REPUBLIC OF IRAQ,	03-0215 (JDB)
Defendant.	

STATEMENT OF INTEREST OF THE UNITED STATES

* * * * *

INTRODUCTION

On January 29, 2004, the Court invited the United States to file a Statement of Interest to address "this Court's jurisdiction in light of the issuance of Presidential Determination No. 2003-23, and in light of the recent issuance of the opinion in *Cicippio-Puleo v. Islamic Republic of Iran* . . . by the D.C. Circuit Court of Appeals." Order at 1. Because Presidential Determination No. 2003-23 rendered the sole jurisdictional basis for this suit—Section 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA")—inapplicable to Iraq, the United States hereby submits this Statement of Interest and

respectfully requests that the Court dismiss this action for lack of subject-matter jurisdiction.

As United States-led military operations in Iraq progressed last year, Congress and the President took certain steps to accomplish the critical policy goals of stabilizing and reconstructing Iraq as quickly as possible. Following the overthrow of Saddam Hussein, Congress granted the President statutory power to render inapplicable federal laws that otherwise applied to Iraq by virtue of its designation as a terrorist state, and the President promptly exercised that authority. These actions by Congress and the President made inapplicable to Iraq 28 U.S.C. § 1605(a)(7), which previously had lifted Iraq's sovereign immunity from suit. Once this provision was made inapplicable, the Court was divested of subject-matter jurisdiction in this action. *See* 28 U.S.C. § 1330 (providing district courts with jurisdiction over civil actions against foreign states, but only where "the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement").

The United States Government is sympathetic to plaintiffs' claims in this case. Nevertheless, the political branches of the Government decided, after the oppressive regime of Saddam Hussein was removed from power, that provisions of law that had previously applied to Iraq only because of its support for terrorism must no longer apply. Among those provisions is Section 1605(a)(7), which lifted Iraq's immunity from suit in U.S. courts for certain terrorism-related claims. In setting aside Section 1605(a)(7), the President restored to a liberated Iraq

a sovereign immunity afforded by United States law to virtually every other foreign country.

Because this case must be dismissed for lack of subject-matter jurisdiction, the Court need not decide the effect on this suit of the D.C. Circuit's recent decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). If the Court finds it necessary to reach that question, however, the holding of *Cicippio-Puleo* is clear: neither Section 1605(a)(7) of the FSIA nor the so-called Flatow Amendment, reprinted at 28 U.S.C. § 1605 Note, creates a private cause of action against a foreign state. Therefore, even if the Court had not been divested of subject-matter jurisdiction, this action could not proceed as currently pled because plaintiffs' complaint appears to rely solely on Section 1605(a)(7) for a cause of action against Iraq.

The United States' appearance in this case, pursuant to the Court's invitation and 28 U.S.C. § 517, is occasioned by: (1) its own significant foreign policy interest in restoring sovereign immunity to a liberated Iraq to remove the burdens created by Saddam Hussein's regime and to speed the rebuilding of that country; (2) its "undeniable interest in the enforcement of its laws," *Roeder v. Islamic Republic of Iran*, 195 F. Supp. 2d 140, 155 (D.D.C. 2002), *aff'd*, 333 F.3d 228 (D.C. Cir. 2003), including Section 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 and Presidential Determination No. 2003-23, *see Roeder*, 195 F. Supp. 2d at 155 (recognizing the United States' "cognizable" interest in the enforcement of an Executive Order and its implementing regulations, which prohibited lawsuits arising out of the Iranian hostage crisis); and (3) its substantial foreign policy

interest in ensuring that Section 1605(a)(7) and the Flatow Amendment are applied correctly and thereby not construed to create federal causes of actions against foreign states.

BACKGROUND

In 1976, Congress enacted the Foreign Sovereign Immunities Act ("FSIA") (Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602-1611)), to codify both the sovereign immunity of foreign States and the exceptions to such immunity. 28 U.S.C. § 1602; *see Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 496-97 (1983). The FSIA provides that, as a general matter, foreign states are immune from the jurisdiction of the courts of the United States. 28 U.S.C. § 1604. The statute also identifies specific exceptions to immunity, *id.* at § 1605, largely codifying the "restrictive theory" of immunity that had governed State Department determinations of foreign sovereign immunity between 1952 and the enactment of the FSIA.[1] *See Joo v. Japan*, 332 F.3d 679, 682 (D.C. Cir. 2003). Thus, for example, the FSIA recognizes a foreign state's amenability to suit if that entity waives its immunity, or if the suit involves certain types of commercial activity. *Id.* at § 1605(a)(1), (2). The FSIA also grants United States district courts jurisdiction over cases in which "the foreign state is not entitled to immunity either under sections 1605-1607 of this

---

[1] Prior to 1952, federal courts generally followed the doctrine of "absolute immunity," as requested by the State Department. *See Verlinden*, 461 U.S. at 486; Joo, 332 F.3d at 682. In 1952, the State Department announced its adoption of the "restrictive theory" of sovereign immunity in the so-called Tate Letter. *See Verlinden*, 461 U.S. at 487.

title or under any applicable international agreement." *Id.* at § 1330.

In 1996, after the Iraqi conduct at issue in this case, Congress amended the FSIA, adding a further exception to the immunity of foreign states with respect to certain state-sponsored terrorist conduct. *See* Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. No. 104- 132, § 221, 110 Stat. 1214, 1241-1243). That amendment abrogates a foreign state's immunity from suit for a claim for personal injury or death caused by hostage taking, among other things, if the act was engaged in "by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605(a)(7). For a suit to come within this exception to immunity, the Secretary of State must have designated the foreign country as a state sponsor of terrorism.[2] *Id.* at § 1605(a)(7)(A). Moreover, if the act giving rise to the suit occurred in the defendant foreign state, the putative plaintiff must have given the state the opportunity to arbitrate the claim. *Id.* at § 1605(a)(7)(B)(i). And either the claimant or the victim must have been a United States national at the time the underlying conduct occurred. Surveying these various restrictions, the D.C. Circuit has described Section 1605(a)(7) as a "delicate legislative compromise" to address the sensitive foreign policy concerns caused by rogue terrorist states. *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 329 (D.C. Cir. 2003) (quoting *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88-89 (D.C. Cir. 2002)); *see also*

[2] Iraq was designated by the Secretary of State as a state sponsor of terrorism in 1990. *See* 55 Fed. Reg. 37793 (Sept. 13, 1990).

Daliberti v. Republic of Iraq, 97 F. Supp. 2d 38, 50 (D.D.C. 2000); Molora Vadnais, *The Terrorism Exception to the Foreign Sovereign Immunities Act*, 5 UCLA J. Int'l L. & For. Aff. 199, 216 (2000). In this regard, Section 1605(a)(7) thus differs markedly from the other, generally applicable exceptions to foreign sovereign immunity enumerated in Section 1605(a).

On February 10, 2003, plaintiffs filed suit against the Republic of Iraq, seeking damages for the loss of solatium that they suffered when their fathers, Kenneth Beaty and William Barloon, were temporarily taken hostage by the Republic of Iraq in 1993 and 1995, respectively.

The complaint identifies 28 U.S.C. § 1605(a)(7) as the source of the Court's jurisdiction and appears to rely on the same provision for a substantive cause of action against Iraq. On October 22, 2003, the Clerk of Court, at plaintiffs' request, sent the summons and complaint by Federal Express to the "Interim Government, Republic of Iraq, Foreign Affairs Minister, Baghdad, Iraq." Proof of Service of Summons & Complaint, Exhibit 1. According to plaintiffs, the package was delivered to Baghdad on October 26 and signed for by "A. Fatah."[3] *Id.*

In April 2003, however, as part of legislation providing funds for activities in Iraq, Congress authorized the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 *or any other provision of law*

[3] The United States does not herein address the effectiveness of plaintiffs' purported service. It should be noted, however, that there may be serious questions as to whether service in this case was in compliance with 28 U.S.C. § 1608, and the United States reserves the right to address that issue at a later date, if necessary.

that applies to countries that have supported terrorism." Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579 (emphasis added) (attached hereto at Tab 1). On May 7, 2003, President Bush implemented the statutory authority conferred by Section 1503 of the EWSAA by issuing Presidential Determination No. 2003-23. This determination expressly made inapplicable to Iraq "section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the 'FAA'), and any other provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23, 68 Fed. Reg. 26459 (May 16, 2003) (attached hereto at Tab 2). In a message to Congress of May 22, 2003, the President explained that the provisions of law made inapplicable to Iraq by the Determination "include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610 and section 201 of the Terrorism Risk Insurance Act." President's Message to Congress Reporting the Declaration of a National Emergency with Respect to the Development Fund of Iraq, 39 Weekly Comp. Pres. Docs. No. 21, at 647-48 (May 22, 2003) (attached hereto at Tab 3). Thus, effective May 7, 2003, the date of the Presidential Determination, the basis for plaintiffs' claims that Section 1605(a)(7) abrogated Iraq's sovereign immunity from suit was removed, and with it Article III jurisdiction to litigate this suit.[4]

---

[4] The D.C. Circuit, in *Acree v. Iraq*, No. 03-5232, is currently considering the effect of Presidential Determination No. 2003-23 on subject-matter jurisdiction in a Section 1605(a)(7) case against Iraq. Briefing in *Acree* has been completed, and oral argument is scheduled for April 15, 2004.

DISCUSSION

I. THE COURT LACKS SUBJECT-MATTER JURISDICTION OVER THIS ACTION

The FSIA provides that foreign governments and their agencies or instrumentalities "shall be immune from the jurisdiction of the courts of the United States," unless one of the FSIA's specific exceptions is met. 28 U.S.C. § 1604. Indeed, the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in federal court." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 439 (1989). Thus, the FSIA "must be applied by the district courts in every action against a foreign sovereign, since subject-matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Id.* at 434-35 (quoting *Verlinden B.V.*, 461 U.S. at 493). One such exception—Section 1605(a)(7)—abrogates that immunity in certain suits against foreign states that have been designated as sponsors of terrorism.

Plaintiffs' complaint identified 28 U.S.C. § 1605(a)(7) as the basis for subject-matter jurisdiction in this suit. As of May 7, 2003, however, Congress' enactment of Section 1503 of the EWSAA, as implemented by Presidential Determination No. 2003-23, rendered Section 1605(a)(7) inapplicable to Iraq, thus depriving the Court of jurisdiction under 28 U.S.C. § 1330. Because Congress and the President together have removed the sole jurisdictional basis for this suit, there is no longer any authority for this Court to exercise jurisdiction over plaintiffs' complaint. Accordingly, this action must be dismissed.

A. Congress and the President Made Section 1605(a)(7) of the FSIA Inapplicable to Iraq, Thereby Restoring Iraq's Sovereign Immunity over Claims Brought Pursuant to that Provision

The EWSAA authorized the President to "make inapplicable with respect to Iraq . . . any . . . provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503 (Tab 1). In passing the EWSAA, Congress thus restored to the Executive Branch in some measure the authority, exercised before the enactment of the FSIA, to determine if a foreign state could be sued in United States courts.[5] *See, e.g., Verlinden B.V.*, 461 U.S. at 486-87 ("[T]his Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on

---

[5] Congress restored that authority with respect to a category of claims that did not fall within the general exemptions to foreign sovereign immunity enacted in 1976, and that could be brought in U.S. courts under the special grant of authority in 28 U.S.C. § 1605(a)(7) only on the basis of a prior designation of the particular foreign state by the Executive Branch as a sponsor of terrorism. It therefore followed naturally from the nature of the special exemption from foreign sovereign immunity in Section 1605(a)(7) that Congress would confer on the President the authority to render that special exemption inapplicable in light of intervening developments in Iraq. *See United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 307, 320 (1936) (upholding statute authorizing President to prohibit the sale of arms to certain countries if he found that such a prohibition would "contribute to the reestablishment of peace," because in the area of foreign affairs, where President has "plenary and exclusive" power, Congress "must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved").

whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"; after 1952, "initial responsibility for deciding questions of sovereign immunity fell primarily upon the Executive acting through the State Department and the courts abided by 'suggestions of immunity' from the State Department."); *Nat'l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 360 (1955) ("As the responsible agency for the conduct of foreign affairs, the State Department is the normal means of suggesting to the courts that a sovereign be granted immunity from a particular suit."); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) ("It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize."); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1169 (D.C. Cir. 1994) ("The Department of State embraced the restrictive theory of immunity in 1952," whereby it "continued to advise courts on a case-by-case basis whether immunity should be granted.").

On May 7, 2003, President Bush implemented the statutory authority granted to him under Section 1503 of the EWSAA by issuing Presidential Determination No. 2003-23, which expressly made inapplicable to Iraq "section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the 'FAA'), and any other provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23 (Tab 2).

The effect of these combined legislative and executive actions is clear: any statute that applies to foreign states because they have been designated as

sponsors of terrorism is rendered inapplicable to Iraq. The President expressly stated that his Determination No. 2003-23 rendered Section 1605(a)(7) inapplicable to Iraq. *See* President's Message to Congress (Tab 3) (explaining that the provisions of law made inapplicable to Iraq by the Determination "include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610 and section 201 of the Terrorism Risk Insurance Act"). That conclusion is unassailable. By its terms, Section 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism," because the statutory exception to foreign sovereign immunity requires that the foreign state must have been "designated as a state sponsor of terrorism." 28 U.S.C. § 1605(a)(7)(A).

The President's message to Congress identifies three examples of statutory provisions that are "ma[de] inapplicable" by his implementation of Section 1503 of the EWSAA—28 U.S.C. § 1605(a)(7), 28 U.S.C. § 1610, and Section 201 of the Terrorism Risk Insurance Act—in addition to Section 620A of the FAA, which is identified in Section 1503. All three of the statutes listed by the President are inter-related: Section 1610(a)(7) of the FSIA and Section 201 of the Terrorism Risk Insurance Act concern the attachment of property and other measures available to certain plaintiffs seeking to execute a judgment entered in a suit brought under Section 1605(a)(7).

Thus, Section 1503 of the EWSAA, as implemented by the President, makes Section 1605(a)(7) of the FSIA and related provisions "inapplicable" to Iraq. As a result, Iraq's sovereign immunity over suits brought pursuant to Section 1605(a)(7) has been restored.

B. The Presidential Determination Restoring Iraq's Sovereign Immunity over Claims Brought Pursuant to Section 1605(a)(7) was Effective Immediately as to All Pending Claims

The President's determination to make Section 1605(a)(7) inapplicable with respect to Iraq had immediate effect on all pending claims and requires dismissal of this suit. In enacting Section 1503, Congress authorized the President to "make inapplicable with respect to Iraq" any law that "applies to countries that have supported terrorism." Pub. L. 108-11, § 1503. The use of the present tense "make inapplicable" in Section 1503 and in the Presidential Determination is plainly intended to negate the *current* effect of any law that otherwise would apply to Iraq by virtue of that country's designation as a state sponsor of terrorism. Moreover, Section 1503's use of the present perfect tense, authorizing the President to make inapplicable laws that apply to "countries that *have supported* terrorism," (emphasis added), further confirms Congress' intent to allow the President to reinstate Iraq's sovereign immunity with respect to pending cases relating to past acts of terrorism. Thus, once the President acted, the courts were immediately prevented from exercising jurisdiction over any claim brought under Section 1605(a)(7), irrespective of when the claim was filed or when the underlying conduct occurred.

The immediate effect of Section 1503 and the Presidential Determination is entirely consistent with their underlying foreign policy objectives. When Saddam Hussein was in power, Iraq supported international terrorism; as a result, United States

law imposed on Iraq a wide range of legal and economic sanctions designed to discourage that misconduct. *See*, *e.g.*, 10 U.S.C. § 2249a(a) (loss of Department of Defense assistance); *id.* § 2327(b) (loss of military contracts); 15 U.S.C. § 7410(b) (loss of grants and fellowships to Iraqi nationals); 22 U.S.C. § 2371(a) (loss of aid under Foreign Assistance Act); 26 U.S.C. § 901(j)(2)(iv) (loss of foreign tax credits); 50 U.S.C. App. § 2505(j) (trade restrictions under Export Administration Act). One important component of these sanctions was the special provisions regarding entry and enforcement of judgments against state sponsors of terrorism: 28 U.S.C. § 1605(a)(7), which restricts the foreign sovereign immunity of designated state sponsors of terrorism; 28 U.S.C. § 1610(a)(7), which restricts foreign sovereign immunity from execution of judgments based on § 1605(a)(7); and section 201 of TRIA, which further restricts that immunity from execution, *see* 116 Stat. at 2337-40.

With the ouster of Saddam Hussein and his regime from power, however, our national security and foreign policy interests towards Iraq changed fundamentally. Now, rather than seeking to impose *sanctions* on Iraq, Congress and the President have sought to provide *assistance* to facilitate the prompt and orderly reconstruction of Iraq, and thereby to promote the emergence of a stable, peaceful, and democratic new Iraqi government. In the EWSAA itself, Congress appropriated almost $2.5 billion "for rehabilitation and reconstruction in Iraq," 117 Stat. at 573, and Section 1503, as already discussed, gave the President the authority to make inapplicable to Iraq statutes such as Section 1605(a)(7) that imposed sanctions on Iraq for its terrorist behavior.

Subsequently, Congress appropriated an additional $18.4 billion in reconstruction assistance. *See* Emergency Supplemental Appropriations Act for Defense and for the Reconstruction of Iraq and Afghanistan, 2004, Pub. L. No. 108-106, 117 Stat. 1209, 1225-26 (Nov. 6, 2003). Similarly, the President has sought to ensure the availability of Iraqi and other assets for reconstruction, by committing vested assets to reconstruction activities, *see* Exec. Order 13290, 68 Fed. Reg. at 14307; by nullifying any United States "judgment" or "execution" against specified Iraqi assets, *see* Exec. Order 13303, 68 Fed. Reg. at 31931-32; and by urging other nations to reduce Iraq's large foreign debt and to make Iraqi assets immediately available for reconstruction. The President has also determined that adequate funding for reconstruction is "in the interest of and for the benefit of the United States," *see* Exec. Order 13290, 68 Fed. Reg. at 14307; that the entry and enforcement of judgments against major Iraqi assets constitutes an "unusual and extraordinary threat to the national security and foreign policy of the United States," *see* Exec. Order 13303, 68 Fed. Reg. at 31931; and that "other Iraqi resources" likewise should not be subject to "judgment" or "execution" during the reconstruction process, *see* Message to Congress, at 647 (Tab 3). These policy judgments of Congress and the President are shared by the United Nations Security Council, which itself has undertaken to provide substantial funding for Iraqi reconstruction, *see* United Nations Security Counsel Resolution ("UNSCR") 1483 § 17, to confer litigation immunities upon the principal Iraqi assets at this juncture, *see id.* § 22, and to defer the presentation of specific claims against Iraq until a new "internationally

recognized, representative government of Iraq" is safely constituted, *id.* § 23.

Against this backdrop, Section 1503 and Presidential Determination No. 2003-23 cannot plausibly be construed to provide an implied exception for previously-filed terrorism-related cases. The continuing imposition of *any* damages awards under Section 1605(a)(7), whether related to future or pending cases, posed a serious threat to the crucial foreign policy goal of promptly rebuilding Iraq into a democratic, self-sustaining nation. To prevent the nascent Iraqi government from becoming hobbled with liability judgments arising from the Hussein dictatorship, Congress and the President thus acted to make *immediately* inapplicable federal laws that otherwise applied to Iraq by virtue of its terrorist activity, thereby restoring Iraq's immunity from *all* suits brought pursuant to Section 1605(a)(7).

Significantly, the authority conferred by Congress in Section 1503 is broader in both form and effect than the pre-existing authority to rescind the designation of Iraq as a state sponsor of terrorism. *See* 50 U.S.C. App. § 2405(j)(4); 22 U.S.C. § 2371(c). The effect of a rescission under these statutes would be to restore Iraq's immunity from suit for acts that occur after the rescission, but to leave Iraq subject to suit for its conduct while still designated as a state sponsor of terrorism. *See* 28 U.S.C. § 1605(a)(7) (abrogating foreign state immunity if the state "was designated as a state sponsor of terrorism . . . at the time the act occurred"). By contrast, through the grant by Congress in Section 1503, the President's Determination negates the current effect of Section 1605(a)(7) altogether, regardless of when the underlying conduct occurred. Congress did not, for

instance, use language such as "rescission" (or "de-designation") in Section 1503, but more broadly authorized the President to render terrorism-based statutes inapplicable. It is hardly surprising that Congress and the President viewed the situation in Iraq—where the prior terrorist-sponsoring government was forcibly removed by the United States through military action and where continued liability for terrorist acts of the previous regime would significantly interfere with the successful establishment of a new, peaceful government—as requiring broader action than a situation where a designated state merely ceased supporting terrorism.

Giving immediate effect to the President's Determination under Section 1503 as to all pending terrorism-related claims is also consistent with the controlling presumption for laws implementing foreign policy, and with the frequent practice of the President and Congress in subordinating individual claims against foreign governments to the Nation's larger foreign policy interests.

The Supreme Court has explained that, in the foreign affairs context, the courts should give full and immediate effect to laws reflecting a change in the Nation's foreign policy. In *The Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), a unanimous Court held that a treaty between the United States and France deprived the court of jurisdiction over a condemned vessel, even though in that case, unlike here, the lower court had already rendered judgment before the intervening legal change. *See id.* at 110. As the Court explained, "in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties; but in great

national concerns where individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import." *Id.*

Further, it is well-established that hostage-related claims such as plaintiffs', which obviously implicate the Nation's foreign policy, are subject to preclusion or settlement by the President and Congress as the country's overriding foreign policy interests from time to time demand. *See Dames & Moore v. Regan*, 453 U.S. 654, 679-80 (1981) (holding that the President had power to suspend claims against Iran arising out of hostage crisis and finding it "undisputed that the United States has sometimes disposed of the claims of its citizens without their consent, or even without consultation with them, usually without exclusive regard for their interests, as distinguished from those of the nation as a whole") (internal quotation marks and citation omitted); *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 235 (D.C. Cir. 2003) (holding, with regard to agreement eliminating jurisdiction over claims against Iran arising out of the American Embassy hostage crisis, that "[t]he authority of the President to settle claims of American nationals through executive agreements is clear"); *see also American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386-87 (2003) (President's authority to settle claims of American nationals against foreign governments is "indisputable" and "particularly longstanding," dating back "over 200 years"); *Joo*, 332 F.3d at 684-85 (noting that the 1951 Treaty of Peace with Japan "manifests the parties' intent to resolve matters arising from World War II without involving the courts of the United States").

The authority of the political branches to resolve claims affecting U.S. foreign relations includes the power to terminate already pending claims, as *The Schooner Peggy*, discussed above, itself made clear. *See also Dames & Moore*, 453 U.S. at 666, 686 (President had power to suspend all claims against Iran in any action "pending in any court of the United States"). As these cases demonstrate, because of their obvious foreign policy implications, claims such as plaintiffs' are subject to immediate curtailment, and even extinguishment, by the political branches, as necessary to reflect the Nation's changing foreign policy.[6]

By making Section 1605(a)(7) immediately inapplicable to pending claims, the EWSAA and Presidential Determination do not run afoul of the non-retroactivity principle articulated by the Supreme Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). That doctrine is designed, in the absence of a clear statement, to protect "vested rights" or "settled expectations." *I.N.S. v. St. Cyr*, 533 U.S. 289, 320-21 (2001), and is inapplicable here because the restoration to Iraq of its immunity from suit does not impair any "settled expectation" that plaintiffs would be able to litigate their claims to

---

[6] For similar reasons, the Federal Circuit has concluded that the settlement of such claims by the United States does not constitute a "taking" for which compensation must be paid under the Fifth Amendment. *See, e.g., Abrahim-Youri v. United States*, 139 F.3d 1462, 1468 (Fed. Cir. 1997) (holding that mass settlement, pursuant to the Algiers Accords, of certain claims against Iran did not constitute a taking in light of fact that the government's authority to intercede with respect to plaintiffs' claims against a foreign government formed part of the background law that defined the scope of plaintiffs' property rights).

judgment in the face of dramatic shift in our Nation's foreign affairs. *See Natural Res. Def. Council v. United States Nuclear Regulatory Comm'n*, 580 F.2d 698, 699 (D.C. Cir. 1978) (noting a "reduced room for justifiable expectation" in "the foreign policy context").

Indeed, in 1993 and 1995, at the time of the underlying conduct on which plaintiffs' claims are based, Section 1605(a)(7) had not yet been enacted, and plaintiffs thus had no right or expectation to litigate their claims against Iraq in the courts of the United States.[7] When the anti-terrorism exception was added to the FSIA in 1996, plaintiffs were beneficiaries of the new foreign policy objective underlying Section 1605(a)(7). Yet, in light of the well-established legal principles discussed above, plaintiffs reasonably would have understood that the newly granted ability to sue Iraq in 1996 could be eliminated just as quickly if a change in the Nation's

---

[7] As previously discussed, jurisdiction over a foreign state has been the exception rather than the rule. Thus, in the context of sovereign immunity it is ordinarily the *foreign state* that has the relevant settled expectation. For example, in *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), the D.C. Circuit concluded that "because Japan had a settled expectation in the 1930s and 1940s that its commercial activities would not be subject to suit in a court of the United States, application of the commercial activity exception of the FSIA to acts occurring then would clearly be retroactive in effect." *Id.* at 684. Here, by contrast, plaintiffs could not have possibly had a settled expectation at the time of their mistreatment in 1993 and 1995 that they would be able to litigate to judgment their claims against Iraq in U.S. courts, not only because of the longstanding authority of the political branches to terminate claims against foreign governments, but also because Section 1605(a)(7), the only alleged basis for this Court's jurisdiction over plaintiffs' claims, was not enacted until 1996.

foreign policy so required.[8] One can hardly imagine a more drastic change in foreign policy than has occurred with respect to Iraq, where the United States has by military force, removed the Hussein regime from power and is leading the effort to establish a new, stable, and democratic government to take its place. Thus, Congress and the President's termination of the Court's jurisdiction over plaintiffs' claims by rendering Section 1605(a)(7) "inapplicable" to Iraq was fully in keeping with their indisputable authority to terminate claims that stand as an obstacle to achieving the Nation's foreign policy goals.[9]

Finally, application of a clear statement rule to deny the EWSAA of its natural effect would be

---

[8] Indeed, for several years after Section 1605(a)(7) was added, even if plaintiffs brought successful claims against foreign sovereigns under that provision, they often had little reason to expect that they would actually be able to collect on their judgments. That did not change until late 2002, with the enactment of Section 201 of the Terrorism Risk Insurance Act, Pub. L. No. 107-297, 116 Stat. 2322, 2337 (2002)—another provision that has now been made inapplicable to Iraq by Presidential Determination No. 2003-23. *See* Message to Congress, at 648 (Tab 3).

[9] Here, notably, Congress and the President have not extinguished plaintiffs' claims on the merits, though, plainly, under the authority cited above, they could have. Rather, Congress and the President have taken the lesser step of restoring to Iraq the immunity that it, like all other states, enjoyed at the time of the challenged conduct. The effect, therefore, is to preserve plaintiffs' claims (and the claims of other, similarly situated, persons) pending the establishment of a successor government capable of negotiating the diplomatic or other resolution of claims arising from the misdeeds of its predecessor. This result is consistent with the policy of the United Nations. *See* UNSCR 1483 § 23.

contrary to the Supreme Court's clear holding in *The Schooner Peggy* that, in the foreign affairs context, courts will not require a particularly clear statement before giving immediate effect to a new law reflecting a change in the Nation's foreign policy. 5 U.S. (1 Cranch) at 110. Such a rule would also be inappropriate in light of the President's wide discretion to act independently in the area of foreign affairs. As the Supreme Court held in *Curtiss-Wright*, the President possesses a "plenary and exclusive power . . . as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . ." 299 U.S. at 320. Thus, the "failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore*, 453 U.S. at 678.

That the President has the power to act without specific Congressional authorization in the realm of foreign affairs demonstrates the breadth of his power here, where Congress specifically provided him, in unqualified terms, the broad authority to "make inapplicable with respect to Iraq . . . *any* . . . provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503 (emphasis added). Indeed, when the President acts pursuant to such congressional authorization, "his authority is at its maximum," and is "supported by the strongest of presumptions and the widest latitude of judicial interpretation." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635, 637 (1952) (Jackson, J., concurring). Therefore, even absent a specific statement of Congress that Section

1605(a)(7) may be made inapplicable to pending cases, the President has the independent authority to reach that reasonable conclusion himself, because, at the very least, Section 1503 of the EWSAA "evinces legislative intent to accord the President broad discretion," and thus "may be considered to 'invite' 'measures on independent presidential responsibility.'" *Dames & Moore*, 453 U.S. at 678 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)); *see also Loving v. United States*, 517 U.S. 748, 772 (1996) ("The delegated duty . . . is interlinked with duties already assigned to the President by express terms of the Constitution, and the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter." (internal quotation marks omitted)). In the context of the critical and complex foreign policy interests at stake in the Iraqi reconstruction effort, Congress granted the President sufficient latitude to ensure that the reinstatement of Iraq's immunity would adequately protect the new Iraqi government from suits that could undermine that nation's fiscal well-being.

. . . . . .

When the Saddam Hussein regime was in power, the United States had a foreign policy interest in allowing victims of certain Iraqi abuses to sue Iraq in U.S. courts. When that regime was removed from power, U.S. foreign policy interests toward Iraq changed fundamentally. Congress recognized that, in order to promote the reconstruction of Iraq and to put the country on the path toward a more stable and prosperous future, it would be important for the Executive Branch to have the flexibility to render

inapplicable provisions of U.S. law that had penalized the former Iraqi regime. The President promptly exercised the authority provided by Congress and rendered immediately inapplicable all provisions of law that applied to Iraq by virtue of its sponsorship of terrorism, including Section 1605(a)(7). The Court must give effect to that foreign policy determination.

C. The District Court's Premature Ruling on Subject-Matter Jurisdiction in *Acree v. Republic of Iraq* was Erroneous

On July 21, 2003, the United States moved to intervene in *Acree v. Republic of Iraq*, Civil Action No. 02-0632 (D.D.C.) (Roberts, J.), and concurrently moved, pursuant to Federal Rule of Civil Procedure 59(e), to vacate the default judgment entered against Iraq in that action.[10] The United States' Rule 59(e) motion in *Acree* was based on the same subject-matter jurisdiction deficiency discussed herein.

On July 25, 2003, plaintiffs in *Acree* filed an opposition to the United States' Motion to Intervene, but did not respond at that time to the United States' substantive Rule 59(e) motion that raised the subject-matter jurisdiction issue. On August 6, 2003, the Court denied the United States' Motion to Intervene,[11] and—without the benefit of full briefing

---

[10] On July 7, 2003, plaintiffs in *Acree*, former prisoners of war from the first Gulf War and some of their family members, won a default judgment against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein in his official capacity as the President of Iraq, and were awarded $653,070,000 in compensatory damages and $306,000,000 in punitive damages.

[11] Judge Roberts' ruling in *Acree* on the timeliness of intervention is inapposite here because the United States is not

on the issue—found *sua sponte* that the Court had subject-matter jurisdiction to enter a judgment against Iraq. *See Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003), *appeal pending*, No. 03-5232 (D.C. Cir.).

Judge Roberts' ruling on subject-matter jurisdiction, which is currently under review by the D.C. Circuit, *see* n.4, *supra*, should not be followed here because it was based on several erroneous grounds. First, Judge Roberts held that it was "undisputed that at the time [the] lawsuit was filed, the sovereign immunity of Iraq, Saddam Hussein, and the Iraqi Intelligence Service had been waived under the FSIA and the Court had subject matter jurisdiction." *Acree*, 276 F. Supp. 2d at 100. Although plaintiffs had not made such an argument, Judge Roberts thus held that Section 1503 of the EWSAA and the Presidential Determination "could not operate . . . to restore Iraq's sovereign immunity which had previously been waived." *Id.* at 101.

Contrary to Judge Roberts' opinion, however, it was not undisputed that the sovereign immunity of Iraq, Saddam Hussein, and the Iraqi Intelligence Service had been *waived* under the FSIA. Rather, it was undisputed that, at the time the lawsuit was filed in 2002, Iraq's sovereign immunity had been *abrogated* pursuant to Section 1605(a)(7) and the Secretary of State's designation of Iraq as a state sponsor of terrorism. The waiver exception to foreign sovereign immunity, which is triggered when the foreign state

---

currently seeking to intervene, but is instead filing a Statement of Interest pursuant to the Court's invitation and pursuant to its right to do so under 28 U.S.C. § 517. The United States does, however, reserve its right to seek to intervene in this action for the purposes of appeal, if necessary.

itself accedes to participation in a lawsuit, is separate and distinct from the other statutory exceptions to immunity under the FSIA, which do not require the foreign state's consent. *See* 28 U.S.C. § 1605(a)(1) (providing that a foreign state shall not be immune in any case "in which *the foreign state has waived* its immunity either explicitly or by implication" (emphasis added)).[12]

In a one-sentence footnote, Judge Roberts extended the reasoning of Section 1605(a)(1) waiver cases to Section 1605(a)(7), *see* 276 F. Supp. 2d at 101 n.5, but such a proposition is contrary to well-settled law. Indeed, the D.C. Circuit has previously held that a waiver under the FSIA requires "intentionality," and therefore "depends upon the foreign government's having at some point indicated its amenability to suit." *Princz*, 26 F.3d at 1174; *see also Joo*, 332 F.3d at 686-87 (reaffirming *Princz*); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990) ("courts rarely find that a nation has waived its sovereign immunity. . . without strong evidence that this is what the foreign state intended") (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985)).[13] The examples of implied waivers set forth

---

[12] Section 1605(a)(1) also notes that a foreign sovereign is not immune in any case in which the state has waived its immunity "notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." Section 1605(a)(7), by contrast, includes no such language. Thus, there is obviously no reason to extend the reasoning of Section 1605(a)(1) cases regarding the restoration of immunity to Section 1605(a)(7) cases.

[13] In all of the cases cited by Judge Roberts in support of his holding on waiver, *see Acree*, 276 F. Supp. 2d at 100-01, the foreign state itself either expressly or implicitly waived its

in the legislative history of Section 1605(a)(1) all arise "either from the foreign state's agreement (to arbitration or to a particular choice of law) or from its filing a responsive pleading without raising the defense of sovereign immunity," *Princz*, 26 F.3d at 1174, and courts "have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity." *Id.* (quoting *Frolova*, 761 F.2d at 377). Thus, the D.C. Circuit has rejected claims that foreign states implicitly waive their sovereign immunity when they commit acts that violate *jus cogens* norms, or fundamental principles of international law. *See Joo*, 332 F.3d at 686-87 (Japan did not waive sovereign immunity by subjecting women to sexual slavery and torture before and during World War II); *Princz*, 26 F.3d at 1173-74 (Nazi atrocities of World War II did not waive Germany's sovereign immunity); *see also Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 242-45 (2d Cir. 1997) (Libya's alleged

---

immunity under Section 1605(a)(1) in accordance with the recognized intentionality requirement. *See Aguamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292-93, 1300 (11th Cir. 1999) (holding that affidavit of Ecuador's Ambassador expressly waived sovereign immunity of Ecuadorian governmental agency); *Rodriguez v. Transnave, Inc.*, 810 F. Supp. 194, 196 (S.D. Tex. 1993) (Ecuadorian governmental entity waived its sovereign immunity when it voluntarily appeared in suit and asserted "without qualification" that Court had jurisdiction); *Ipitrade Int'l, S.A. v. Federal Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978) (Nigeria's agreement to adjudicate all disputes arising under a contract in accordance with Swiss law and by arbitration under International Chamber of Commerce rules constituted a waiver of sovereign immunity).

participation in the bombing of Pam Am Flight 103 did not waive sovereign immunity under FSIA).

Plaintiffs here assert jurisdiction over Iraq pursuant to Section 1605(a)(7), not the waiver provision of Section 1605(a)(1). And unlike Section 1605(a)(1), Section 1605(a)(7) does not provide a basis for jurisdiction over a foreign state based on the *state's* intentional acquiescence in being sued. Rather, Section 1605(a)(7) derives from the *United States'* foreign policy determination in 1996 to abrogate the immunity of certain states over suits based on terrorist acts, a determination that is subject to change as the political branches see fit. Because Iraq neither waived its sovereign immunity in this action nor in *Acree*, Judge Roberts' opinion should not be followed.

In his ruling on waiver, Judge Roberts also cited *Daingerfield Island Protective Society v. Lujan*, 920 F.2d 32, 36 (D.C. Cir. 1990), for the proposition that "absent a clear statement to the contrary, legislation should not . . . be interpreted to oust a federal court's . . . jurisdiction over a present case." To the extent that Judge Roberts was insisting upon a clear statement before giving immediate effect to Section 1503 and the Presidential Determination insofar as they ousted the courts of jurisdiction over pending cases, such a conclusion was erroneous. In *Landgraf*, the Supreme Court explained that statutes "ousting jurisdiction" ordinarily become immediately applicable to pending cases "whether or not jurisdiction lay when the underlying conduct occurred *or when suit was filed*." 511 U.S. at 273 (emphasis added). The Supreme Court has invoked and applied that principle repeatedly. *See, e.g., Bruner v. United States*, 343 U.S. 112, 116-17 (1952)

("[W]hen a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law"; this rule "has been adhered to consistently by this Court."); *Hallowell v. Commons*, 239 U.S. 506, 508 (1916) (ousting provision "made no exception for pending litigation, but purported to be universal, and so to take away the jurisdiction that for a time had been conferred upon the courts of the United States"); *Sherman v. Grinnell*, 123 U.S. 679, 680 (1887) ("'[I]f a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall with the law.'" (quoting *Railroad Co. v. Grant* 98 U.S. (8 Otto) 398, 401 (1878))); *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) ("Jurisdiction . . . was conferred by an act of Congress, and when that act of Congress was repealed the power to exercise such jurisdiction was withdrawn, and inasmuch as the repealing act contained no saving clause, all pending actions fell, as the jurisdiction depended entirely upon the act of Congress."); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause."); *id.* ("[N]o judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.").

These principles apply regardless of whether or not there is an alternative judicial forum with continuing jurisdiction over the pending claim. In *Hallowell*, for example, the Supreme Court gave immediate effect to a statute that divested the district courts of jurisdiction to review certain Indian probate determinations made by the Secretary of the Interior. *See* 239 U.S. at 507-08. Speaking

unanimously through Justice Holmes, the Court concluded that the statute "takes away no substantive right," but, by making "final and conclusive" an *Executive* Branch determination, "simply changes the tribunal that is to hear the case." *Id.* at 508. Similarly, in *Bruner*, the Supreme Court gave immediate effect to an amendment that, by restricting the applicable provision of the Tucker Act, restored the federal government's sovereign immunity from the disputed claim at issue. *See* 343 U.S. at 113-14. Anticipating its subsequent analysis in *Landgraf*, the Court specifically explained that "this jurisdictional rule does not affect the general principle that a statute is not to be given retroactive effect unless such construction is required by explicit language or by necessary implication." *Id.* at 117 n.8 (quoted in *Landgraf*, 511 U.S. at 274 n.27).

Judge Roberts erroneously claimed support from *Daingerfield Island*. That case involved a statute divesting the courts of jurisdiction to consider the "factual and legal sufficiency" of an environmental impact statement ("EIS") prepared under the National Environmental Policy Act of 1969. *See* 920 F.3d at 35-36. However, the statute contained another provision stating that the EIS was "separate from, independent of, and in no way intended to affect or modify any pending litigation." *See id.* at 35. Applying the plain language of both provisions, the D.C. Circuit held that the intervening statute *did* divest the district court of jurisdiction over a NEPA claim pending before that court when the statute was enacted, but did not divest the court of jurisdiction over *other* claims independent of any challenge to the EIS. *See id.* at 36-37. To be sure, the Court did briefly state (without elaboration) that a "clear

statement" is necessary to "oust" jurisdiction in pending cases, *see id.* at 36, but it did not cite *Hallowell*, *Bruner*, or any of the other contrary Supreme Court cases, much less attempt to reconcile its own dictum with those cases. In any event, to the extent *Daingerfield Island* might suggest that a "clear statement" is necessary to give immediate effect to statutes ousting a court of jurisdiction, that suggestion is flatly inconsistent with subsequent decisions in *Landgraf*, *see* 511 U.S. at 274, and *LaFontant v. INS*, 135 F.3d 158, 161-63 (D.C. Cir. 1998), which explain at length that *Hallowell* and *Bruner* remain good law. Indeed, in *LaFontant*, the D.C. Circuit specifically applied *Hallowell* to give immediate effect to a statute barring any judicial review of certain administrative orders of deportation. *See id.* at 165. The Court explained that the provision at issue, by making conclusive administrative adjudications rendered by the Executive Branch, "'takes away no substantive right, but simply changes the tribunal that is to hear the case." *Id.* at 162 (quoting *Hallowell*, 238 U.S. at 508).[14]

Finally, Judge Roberts held that, even if the Presidential Determination operated to restore Iraq's sovereign immunity, "the defense of sovereign immunity could be asserted only by Iraq, not by the United States."[15] *Acree*, 276 F. Supp. 2d at 101. The

---

[14] As discussed above, a clear statement rule is also inappropriate in the context of foreign affairs. *See* sub-section I.B., *supra*.

[15] Judge Roberts own reasoning on this point was internally inconsistent, because he also recognized that a court "has an obligation to determine *sua sponte*" whether it has subject-matter jurisdiction. *Acree*, 276 F. Supp. 2d at 100 (citing

United States, however, is not seeking to assert a defense on behalf of Iraq (nor was it seeking to do so in *Acree*). Rather, as already discussed, the United States is appearing in this action to protect its substantial foreign policy interest in restoring sovereign immunity to a liberated Iraq and its "undeniable interest in the enforcement" of the EWSAA and Presidential Determination No. 2003-23. *Roeder*, 195 F. Supp. at 155; *see also Roeder*, 333 F.3d at 233 (holding that interest of the United States was not in providing Iran with a defense, but in upholding an executive agreement with Iran). Furthermore, as this Court has essentially recognized by raising the jurisdictional issue *sua sponte* and by inviting the United States to file this Statement of Interest, Iraq's appearance is not necessary to bring the jurisdictional issue before the Court. As the Supreme Court has expressly held, "even if the foreign state does not enter an appearance to assert an immunity defense, a District Court still must determine that immunity is unavailable under the Act," because "subject matter jurisdiction turns on the existence of an exception" under the FSIA. *Verlinden B.V.*, 461 U.S. at 494 n.20. Thus, even though Iraq has not asserted sovereign immunity in this action, the Court must still address its subject-matter jurisdiction.[16]

Murphy Exploration & Production Co. v. Department of Interior, 252 F.3d 473, 479-80 (D.C. Cir. 2001)).

[16] Judge Roberts also held that "even if Iraq's sovereign immunity could be restored . . .and even if the United States could raise the defense of sovereign immunity on behalf of Iraq," the Court still had subject-matter jurisdiction to enter judgment against Saddam Hussein and the Iraqi Intelligence Service, because neither the EWSAA nor the Presidential Determination mentioned those two defendants by name. *Acree*,

D. Without Jurisdiction, the Court Can No Longer Proceed and Must Dismiss This Action

When it becomes clear at any point before or after judgment that a Court lacks jurisdiction, it must dismiss the case, and any judgment entered without jurisdiction is necessarily void. "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it

---

276 F. Supp. 2d at 101. That ruling is inapplicable here, where the only named defendant is the Republic of Iraq. Nevertheless, Judge Roberts erred on this point as well.

According to Judge Roberts' reasoning, any plaintiff could get around the jurisdictional bar to Section 1605(a)(7) suits against Iraq simply by recasting the form of his complaint to name an Iraqi official or agency as an official-capacity defendant. That reasoning is internally inconsistent. Section 1605(a)(7)—the sole provision asserted by plaintiffs in *Acree* (and here) as a basis for an abrogation of sovereign immunity—by its terms provides jurisdiction only for certain claims "against a foreign state." Thus, the premise of plaintiffs' assertion in *Acree* that the Court had jurisdiction over the Iraqi Intelligence Service and the former Iraqi President in his official capacity was, necessarily, that those entities were part of the state of Iraq for purposes of Section 1605(a)(7). *See Roeder*, 333 F.3d at 234 (Iranian foreign ministry was part of Iran itself: "if the core functions of the entity are governmental, it is considered the foreign state itself; if commercial, the entity is an agency or instrumentality of the foreign state"); 28 U.S.C. § 1603 (for purposes of the FSIA, "foreign state" includes an agency or instrumentality of such state). Therefore, assuming arguendo that Section 1605(a)(7) could serve as a basis for abrogating the immunity of the Iraqi Intelligence Service and Saddam Hussein, if that provision is rendered inapplicable to Iraq, it would also be rendered inapplicable to the head of state and other officials and entities that were sued as a part of the state. Accordingly, it was unnecessary for Congress and the President explicitly to render Section 1605(a)(7) inapplicable to any specific entity in addition to rendering that provision inapplicable to Iraq.

ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868). In *McCardle*, as in this case, the relevant statute conferred jurisdiction at the time the case was brought, but, while the case was pending before the Supreme Court, Congress rendered inapplicable the statute that gave the Court jurisdiction over the case, requiring dismissal.

Likewise, in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), the plaintiffs sued the Government for allegedly targeting them for deportation because of their affiliation with a politically unpopular group. While the suit was pending, Congress enacted new legislation eliminating judicial review "of the Attorney General's 'decision or action' to 'commence proceedings, adjudicate cases, or execute removal orders against any alien under'" the Immigration and Nationality Act. *Id.* at 472 (quoting 8 U.S.C. § 1252(g)). Because the plaintiffs' case was a challenge to the Attorney General's decision to deport them, the Supreme Court held that the federal courts lacked jurisdiction over the case. *Id.* at 487, 492.

Here, Section 1503, as implemented by the President, "make[s] inapplicable with respect to Iraq" the jurisdictional provision relied on by plaintiffs in this action. Just as in *McCardle* and *American-Arab*, the inapplicability of the relevant jurisdictional statute while the case is pending compels the conclusion that this Court lacked subject-matter jurisdiction as of May 7, 2003. Therefore, plaintiffs' complaint must be dismissed.

II. PLAINTIFFS HAVE NOT PLED A VIABLE CAUSE OF ACTION AGAINST IRAQ

Because the Court has been divested of subject-matter jurisdiction in this action and must therefore immediately dismiss this case, the Court need not reach the question of whether plaintiffs have pled a viable cause of action against the Republic of Iraq. If the Court should find it necessary to rule on that issue, however, the D.C. Circuit's recent decision in *Cicippio-Puleo* is dispositive.

In *Cicippio-Puleo*, the D.C. Circuit held that "neither 28 U.S.C. § 1605(a)(7) nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." 353 F.3d at 1033. As the Court explained, "Section 1605(a)(7) merely waives the immunity of a foreign state without creating a cause of action against it, and the Flatow Amendment only provides a private right of action against officials, employees, and agents of a foreign state, not against the foreign state itself." *Id.*

Plaintiffs' complaint appears to rely solely on Section 1605(a)(7) as the source of a substantive cause of action against Iraq. Therefore, *Cicippio-Puleo* requires that plaintiffs' complaint, at least as currently pled, must also be dismissed for failure to state a cause of action.[17]

---

[17] Unlike in *Cicippio-Puleo*, however, plaintiffs should not be afforded an opportunity to cure their complaint by adding other potential causes of action. For reasons already discussed, Iraq's sovereign immunity over this suit has been restored, and the Court no longer has subject matter jurisdiction to consider this case.

CONCLUSION

For the foregoing reasons, this Court should dismiss plaintiffs' complaint for lack of subject-matter jurisdiction.

Dated: March 15, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
ROSCOE C. HOWARD, JR.
United States Attorney
SHANNEN W. COFFIN
Deputy Assistant Attorney General
JOSEPH H. HUNT
Director, Federal Programs Branch
VINCENT M. GARVEY
Deputy Director, Federal Programs Branch

/s/ Andrew H. Tannenbaum
ANDREW H. TANNENBAUM (N.Y. Bar)
Trial Attorney
U.S. Department of Justice, Civil Division
P.O. Box 883
20 Massachusetts Ave., NW
Washington, D.C. 20044
(202) 514-4263
(202) 616-8202 (fax)
Counsel for United States of America

APPENDIX L

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, *et al.*, Plaintiffs, v. REPUBLIC OF IRAQ, Defendant.	Civil Action No. 03-0215 (JDB)

PLAINTIFFS' RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES

Plaintiffs respectfully submit this Memorandum in response to the Statement of Interest of the United States.

BACKGROUND

The underlying facts of this case are not in dispute.[1] Plaintiffs Jordan Beaty and Austin Makenzie Beaty are the daughters of Kenneth Beaty,

[1] This action was filed as related case to *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 21 (D.D.C. 2001), in which this Court (Oberdorfer, J.) issued final judgments for monetary damages against Iraq in favor of, *inter alia*, Kenneth Beaty, William Barloon and their respective spouses, whose claims were based upon the same acts of hostage taking and torture addressed by Plaintiffs in this case.

an American civilian taken hostage and tortured by Iraq for 205 days. Plaintiffs William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are the children of William Barloon, who, like Kenneth Beaty, was held hostage by Iraq for some 126 days.

Following the conclusion of the first Gulf War in 1991, Kenneth Beaty and William Barloon began working in civilian capacities near the Iraq-Kuwait border. Mr. Beaty worked as an oil rig drilling supervisor, while Mr. Barloon supervised aircraft maintenance and overhaul. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19, 21 (D.D.C. 2001).

On April 25, 1993, Mr. Beaty was taken hostage by Iraq and held in order to force the United States to provide humanitarian aid to, or lift sanctions against, Iraq. Iraqi officials ultimately released Mr. Beaty into the custody of Senator David Boren on November 14, 1993, after being held for 205 days. Complaint ¶ 8.

William Barloon was taken hostage by Iraqi border guards on March 13, 1995, and held as leverage to exact concessions from the United States. Complaint ¶ 6. Ultimately, Iraq released Mr. Barloon into the custody of Congressman William Richardson after 126 days as a hostage. Complaint ¶ 4.

Plaintiffs' suffering during their fathers' captivity was significant. They were deprived of their relationships with their fathers, and were totally dependent upon their mothers for financial and emotional support. Plaintiffs' anguish did not abate, even after their fathers' return. Although their fathers were physically present, they were emotionally absent, unable to provide the love and support their children so desperately needed. As Judge Oberdorfer recognized in *Daliberti*.

> Following their release, [Mr. Beaty and Mr. Barloon] exhibited marked changes in personality, such as anger, feelings of detachment and isolation, nightmares, and insomnia. Each [of them] has suffered significant damage to his marriage and has ongoing problems with intimacy and personal relationships . . . . [T]hese men will experience these effects for the rest of their lives.

Daliberti, 146 F. Supp. 2d at 23-24.

On February 10, 2003, Plaintiffs filed this action against Iraq seeking monetary damages, including loss of solatium, for their emotional distress. Plaintiffs invoked this Court's jurisdiction under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(7). In compliance with the requirements of the FSIA, Plaintiffs served their Complaint on Iraq on or about October 22, 2003.

ARGUMENT

I. The Construction of § 1503 Urged by the Government Violates the Presentment Clause of Article I of the Constitution

The Government asserts that § 1503 of the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559, conferred upon the President the unfettered discretion to "make inapplicable with respect to Iraq" any provision of law that pertains to state sponsors of terrorism. Pursuant to § 1503, President Bush issued Presidential Determination 2003-23, 68 Fed. Reg. 26459 (May 16, 2003), which, as he explained in a May 22, 2003 message to Congress, retrospectively

eliminated the jurisdiction of Article III courts to adjudicate actions against Iraq set forth under § 1605(a)(7). (U.S. at 8). The Government characterizes this Determination as a valid exercise of the President's plenary and exclusive power over foreign affairs. *(See, e.g.*, U.S. at 7 n.5). In reality, however, the Determination—boiled down to its essence—is nothing more than a Presidential repeal of § 1605(a)(7) as it applies to Iraq, and is therefore violative of the Presentment Clause.

It is axiomatic that "[t]here is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." *Clinton v. New York*, 524 U.S. 417, 438 (1998). To the contrary, "[r]epeal of statutes, no less than enactment, must conform with Art. I." *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 954 (1983)). Article I, in turn, requires that legislative Bills pass both Houses of Congress and be presented to the President for his approval and signature. *See* U.S. Const. Art. I, § 7 cl. 2. Statutes such as § 1503, which confer upon the President the power to repeal duly enacted legislation without bicameral approval or presentment, constitute an improper delegation of legislative power in contravention of Article I, and are therefore unconstitutional.

The Supreme Court has identified three factors used to determine whether a legislative delegation of authority violates the Presentment Clause of Article I. *See id.* at 443. First, any exercise of the authority conferred upon the President must be "contingent upon a condition that did not exist when the [legislation] was passed," *Id*, Second, the President, upon the occurrence of that contingency, must be under a duty to act, with no discretion in

that regard. *See id.* And third, in exercising the authority conferred upon him by Congress, the President must be "executing the policy that Congress had embodied in the statute." *Id.* at 444.

In *Clinton*, the Supreme Court addressed the constitutionality of the Line Item Veto Act, which gave the President the power to cancel direct spending items and tax benefits, including provisions of the duly enacted Balanced Budget and Taxpayer Relief Acts. *See id.* at 421, 436. The Court concluded that the Line Item Veto Act contravened the Presentment Clause because it impermissibly conferred upon the President the unilateral power to repeal duly enacted legislation. *See id.* at 442-43. Applying the criteria enunciated above, the Court found that: (1) "the exercise of the cancellation power within five days after the enactment of the Balanced Budget and Tax Reform Acts necessarily was based on the same conditions that Congress evaluated when it passed those statutes;" (2) the Line Item Veto Act contained no limitations on the President's discretion to cancel those provisions; and (3) the President, in canceling the various provisions, was "rejecting the policy judgment made by Congress and relying on his own policy judgment." *See id* at 443-44.

In an effort to salvage the Line Item Veto Act from constitutional attack, the Government in *Clinton* countered that the Act expressly authorized the President to repeal valid legislation. Thus, so the Government claimed, any cancellations made by the President pursuant to the Act did not violate the Presentment Clause, *See id* at 445. Rejecting this argument, the Court noted:

> The fact that Congress intended such a result is of no moment. Although Congress presumably anticipated that the President might cancel some of the items in the Balanced Budget Act and in the Taxpayer Relief Act, Congress cannot alter the procedures set out in Article I, § 7, without amending the Constitution.

Id. at 445-46.[2]

Like the Line Item Veto Act at issue in *Clinton*, § 1503 (as construed by the Government) impermissibly grants the President the power to repeal § 1605(a)(7) as it applies to Iraq, and therefore runs afoul of Article I's Presentment Clause. For one, the President's exercise of authority under § 1503 was not contingent upon any condition, let alone one not in existence when that legislation was passed. Moreover, the President's authority under § 1503 is clearly discretionary, as he is authorized (but not required) to make inapplicable to Iraq any provision of law that pertains to nations by virtue of their designation as a state supporter of terrorism. Finally, in exercising the authority conferred upon him pursuant to § 1503, the President was not "executing the policy that Congress had embodied in the statute," for as noted in Point IIB, *infra*. Congress did not manifest any

---

[2] *See also id.* at 451-52 (Kennedy, J., concurring) ("It is no answer, of course, to say that Congress surrendered its authority by its own hand .... That a congressional cession of power is voluntary does not make it innocuous. The Constitution is a compact enduring for more than our time, and one Congress cannot yield up its own powers, much less those of other Congresses to follow").

intention to divest retroactively U.S. courts of jurisdiction over actions against Iraq.[3] Clearly, § 1503—having met each of the factors set forth in *Clinton*—constitutes an improper delegation of authority to the President to repeal § 1605(a)(7), and is therefore invalid under the Presentment Clause of the Constitution.

II. Section 1503 of the EWSAA Does Not Apply Retroactively to Restore Iraq's Sovereign Immunity for Terrorist Conduct Predating Its Enactment

In *Landgraf* and *Lindh*, the Supreme Court set out a three-part inquiry for considering the temporal reach of new federal enactments. Under this analysis, a court must first determine whether Congress provided an "unambiguous directive" defining the

[3] Section 1503 is all the more troubling because, under the interpretation urged by the Government, it authorized the President to divest the jurisdiction of Article III courts. It is well settled that Congress possesses plenary power to define the jurisdiction of the federal courts. *See Palmore v. United States*, 411 U.S. 389, 401 (1973) (quoting *Carv v. Curtis*, 44 U.S. 236, 244-45(1845) ("[T]he judicial power of the United States ... is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals .. . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good"). In recognition of that power, courts have been wary of authorizing the President to in any way curtail or interfere with that power. *See, e.g., Dames & Moore v. Regan*, 453 U.S. 654, 684-85 (1981) (Court upheld the Executive Order, noting that it did not improperly divest federal courts of jurisdiction, but rather suspended actions pending the exercise of jurisdiction by a claims tribunal; to the extent the actions fell outside the jurisdiction of the claims tribunal, they would be revived in U.S. courts).

temporal reach of a statute. *See Landgraf v. USI Film Products*. 511 U.S. 344, 263 (1994). In the absence of a clear statement from Congress, a court must next determine whether the normal rules of statutory construction "apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case)." *Lindh v. Murphy*. 521 U.S. 320, 326 (1997). If neither an express command by Congress to apply the statute retrospectively nor an intent to do so under normal rules of statutory construction is found, a court must next determine whether the statute at issue has a "retroactive effect." *Landgraf*, 511 U.S. at 280. If the answer to this question is "yes," a court should employ the strong presumption against applying that statute to pending cases absent "clear congressional intent favoring such a result." *Id*.

Applying this framework to the instant case, it is clear that § 1503 cannot be applied retrospectively to oust this Court of jurisdiction in this case.

As a preliminary matter, it cannot be disputed that § 1503 contains no "unambiguous directive" that the statute should be applied retrospectively to cases pending at the time of its enactment. Indeed § 1503 is completely silent as to the temporal reach of that legislation. Other than its argument that § 1503 is phrased in the present tense (U.S. at 9-10)—a claim that will be addressed in further detail, *infra*—the Government has not pointed to a single word or phrase in § 1503 that expressly mandates the retrospective application of that provision.

A. Normal Rules of Statutory Construction Preclude the Retrospective Application of § 1503

Given the absence of an express prescription directing the retrospective application of § 1503, the Court must next determine whether "normal rules of statutory construction" render the statute inapplicable to pre-enactment events.

The Government, for its part, insists that the wording of § 1503—authorizing the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism"—confers upon the President the power retroactively to restore Iraq's sovereign immunity and deprive this Court of its jurisdiction over pending cases against Iraq. (U.S. at 6). The Government fails to consider, however, that the language of § 1503 so essential to their position does not exist "in a vacuum." *Tyler v. Cain*, 533 U.S. 656, 662 (2001). Instead, this language appears in a proviso contained within a broader emergency appropriations measure whose purpose was to lift any barriers to aid and commerce with Iraq, both so essential to that country's rebuilding efforts. Given this context, were the Court to accept the Government's reading of § 1503, it would do so in direct contravention of four basic cannons of statutory construction.

1. Section 1503, Included As Part of an Appropriations Bill, Does Not Eliminate Plaintiffs' Statutory Right to Sue Iraq

One such rule of construction recognizes that the purpose of appropriations legislation is to

appropriate. Accordingly, there is a "very strong presumption" against interpreting appropriations legislation to "substantively change existing law." *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000) (*citing Building & Constr. Trades Dep't v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992). Similarly, the "cardinal rule" disfavoring repeals by implication apply "with even greater force when the claimed repeal rests solely on an Appropriations Act." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 189, 190 (1978).

Here, the proviso at issue in § 1503 appears in the EWSAA, a supplemental appropriations bill, within a chapter entitled "Bilateral Economic Assistance Funds Appropriated to the President." *See* 117 Stat. 559, 572. In light of the presumption against modifying or repealing existing law though appropriations measures, § 1503 cannot be interpreted, as the Government urges, to eviscerate Plaintiffs' vested right to sue Iraq in U.S. courts under § 1605(a)(7).

2. The Proviso At Issue in § 1503, When Construed in Light of § 1503 As a Whole, Does Not Remove Federal Jurisdiction Over Pending Cases Against Iraq

As noted above, the language of § 1503 upon which the Government's theory rests is a subordinate proviso. It is a well settled rule of construction that courts interpreting provisos must do so in the context of the entire legislative scheme. *See Schwartz v. Sacks*, 2 F.2d 188, 189 (D.C. Cir. 1924). Moreover, because the "grammatical and local scope [of a proviso] is confined to the principal clause," courts also must construe provisos in light of the principal clause and the purpose that it serves.

United States v. Morrow, 266 U.S. 531, 534-35 (1925) ("The general office of a proviso is to except something from the enacting clause, or to qualify and restrain its generality and prevent misinterpretation."). In doing so, courts must be mindful of this Circuit's admonition that provisos should never be interpreted to broaden the principal clause, but instead must be "strictly construed." *Way of Life Television Network v. FCC*. 593 F.2d 1356, 1359 (D.C. Cir. 1979).

Applying these rules of construction, it is manifest that the proviso at issue in § 1503 was never intended to deprive victims of Iraqi terrorism of their right to sue in U.S. courts. To the contrary, Congress enacted the EWSAA to provide badly needed assistance and relief to Iraq in the aftermath of the fall of Baghdad to coalition forces. This goal could not be achieved, however, unless the barriers to aid and commerce—imposed upon Iraq due to Saddam Hussein's support for international terrorism—were lifted. The sole focus of § 1503, including the proviso at issue here, is the removal of such barriers. Indeed, the principal clause of § 1503 authorized the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990," thereby eliminating any obstacles to foreign assistance and private trade with Iraq.

The Iraq Sanctions Act of 1990[4] continued the embargo on trade and financial assistance to Iraq by calling for, among other things, full enforcement of § 620A of the Foreign Assistance Act of 1961,[5] which prohibits assistance to countries designated by the

[4] Pub. L. 101-513, 104 Stat. 1979.

[5] 22 U.S.C. § 2371 (a) & (b) (2000).

Secretary of State as supporters of terrorism. Once a nation has been designated a state supporter of terrorism, § 602A provides that the designation may not be rescinded (and financial assistance restored) absent certification, again by the Secretary of State, that the state at issue has new leadership, is not supporting acts of terrorism, and has pledged not to support terrorism in the future. *See* 22 U.S.C. § 2371(c)(1) (2000).

Significantly, in April 2003, when Congress enacted the EWSAA, such certification of Iraq was impossible for the simple reason that there was no established government in Iraq to certify. In the absence of this certification, Congress—in order to provide the urgently needed financial assistance to Iraq—had to authorize the President to make inapplicable to Iraq § 620A, along with any other obstacles to foreign trade premised on Iraq's designation as a state sponsor of terrorism. Congress enacted § 1503, including the proviso at issue here, precisely to achieve this limited purpose and not, as the Government suggests, to confer upon the President the power retroactively to remove jurisdiction over pending cases against Iraq.[6]

Indeed, in a letter dated March 25, 2003 (attached hereto at Tab A), the Director of the Office of Management and Budget confirmed that § 1503 "would repeal the Iraq Sanctions Act of 1990," and

---

[6] The remaining provisos confirm that § 1503 was intended solely to facilitate foreign aid to, and trade with, Iraq. Several such provisos expressly lift restrictions on humanitarian assistance, financial and technical assistance, and trade. Still another terminates the President's authority under § 1503 on the earlier of September 30, 2004, or "the date of enactment of a subsequent Act authorizing assistance for Iraq . . . ."

"would also authorize the President to make inapplicable with respect to Iraq section 620A, and section 620G, and section 307 of the Foreign Assistance Act." Sections 620G and 307, like § 602A, each require that aid be withheld from countries that support terrorism, and therefore had to be circumvented in order to provide aid to Iraq.

In sum, § 1503 was intended to remove impediments to aid and commerce with Iraq. The Government's reading of the proviso at issue here is plainly inconsistent with the overriding purpose of both EWSAA and § 1503, and thus should not be countenanced.

3. The "Any Other Provision of Law" Language in § 1503 Cannot Be Construed to Eliminate Federal Jurisdiction Over Plaintiffs' Claims

A third cannon of statutory construction implicated by the Government's interpretation of § 1503 provides that "[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Washington State Dep't of Social & Health Servs. v. Guardianship Estate of Danny Keffeler*. 537 U.S. 371, 384 (2003) (citations omitted).

The Government contends that the "any other provision of law" language in the proviso of § 1503 authorizes the President to restore sovereign immunity for Iraq and eliminate federal jurisdiction over pending cases against that country. Yet this language is immediately preceded by the statement authorizing the President to make inapplicable to Iraq § 602A of the Foreign Assistance Act of 1961. Applying the rule of construction enunciated above,

the "any other provision" language so essential to the Government's position is necessarily limited by the nature of 620A. Put differently, this language is limited to provisions that, like 602A, would facilitate trade with and assistance to Iraq once made inapplicable to that country. Accordingly, the Government's interpretation of § 1503 cannot stand.

4. Section 1503 Does Not Nullify the Carefully Worded Temporal Provision of § 1605(a)(7)

Finally, the far-reaching interpretation of § 1503 urged by the Government flies in the face of a fourth rule of statutory construction, which holds that a narrow, precisely drawn statute will not be controlled or preempted by a general one absent a clear intention to do so. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 152 (1976) ("[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . .."); *see also United Ass'n of Journeymen & Apprentices v. Reno*, 73 F.3d 1134, 1140 (D.C, Cir. 1996) (same). As the Supreme Court has explained

> when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general matter, *and not expressly contradicting the original act*, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

Radzanower v. Touche Ross & Co.. 426 U.S. at 152 (citations omitted) (emphasis added).

The specific, narrowly drawn statute at issue here is § 1605(a)(7), which permits certain suits against foreign nations if such nations were state sponsors of terrorism "at the time the act occurred." 28 U.S.C. § 1605(a)(7) (2000). Under the plain language of this section, the subsequent lifting of that nation's designation as a state sponsor of terrorism is of no import. Rather, a foreign nation will be subject to suit so long as it retained that designation at the time of the act in question.

Disregarding this clear language, the Government contends that the extraordinarily general "make inapplicable with respect to Iraq" language of § 1503 somehow negates the specific temporal scope of § 1605(a)(7). This simply cannot be, as there is nothing in the language of § 1503 to indicate that it was intended to "expressly contradict[]" the carefully worded timing provision of § 1605(a)(7). When Congress chooses to repeal or modify substantive legislation, it certainly knows how to do so; it need not "hide elephants in mouseholes." *Whitman v. American Trucking Ass'n.* 531 U.S. 457, 468 (2001).

B. The Interpretation of § 1503 Advanced By the Government Would Give § 1503 an Impermissible Retroactive Effect, One Not Clearly Intended By Congress

Inasmuch as the four canons of statutory construction set forth above preclude the reading of § 1503 advanced by the Government, this Court need not address the issue of § 1503 's temporal scope. *See Lindh*, 521 U.S. at 326. To the extent the Court does so, however, the only logical conclusion is that § 1503 cannot be applied retrospectively to oust this Court of jurisdiction over the instant case.

As the Supreme Court recognized in *Landgraf*. "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. This presumption applies to any legislation that has a "retroactive effect," meaning that it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . ." *Id.* at 269. The need for such a presumption is patent, as "[t]he Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration." *Id.* at 266. For this reason, legislation that has an impermissible retroactive effect will not be applied retrospectively "unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. United States*. 520 U.S. 939, 946 (1997).

The Government contends that (i) § 1503 has no impermissible retroactive effect because it is merely a jurisdiction-ousting statute, and (ii) even if § 1503 has a retroactive effect, Congress clearly expressed its intention that the statute apply to pending cases, thereby eliminating jurisdiction over the instant matter. Each of these arguments is wholly without merit.

1. Section 1503 Does Have an Impermissible Retroactive Effect

In *Hughes*, the Supreme Court articulated the circumstances in which the presumption against retroactivity should be applied to jurisdictional statutes. As the Court explained, "[s]tatutes merely addressing *which* court shall have jurisdiction to

entertain a particular cause of action" are not subject to the presumption against retroactivity because they simply regulate "*where* a suit may be brought." *Id.* at 951 (emphasis in original). On the other hand, the presumption does apply to statutes affecting "*whether* [a suit] may be brought at all" because such statutes "speak[] not just to the power of a particular court but to the substantive rights of the parties as well." *Id.* (emphasis in original). These latter statutes, the Court continued, "even though phrased in 'jurisdictional' terms, [are] as much subject to our presumption against retroactivity as any other." *Id.*

In an obvious misreading of *Hughes*, the Government first makes the broad-brush argument that the presumption against retroactivity is inapplicable because § 1503 is merely a jurisdiction-ousting statute to which that presumption does not pertain. (U.S. at 22). This claim is belied by no more than a cursory reading of *Hughes*, which, when considering the applicability of the presumption against retroactive legislation, made absolutely no distinction among statutes that confer jurisdiction and those that eliminate it.

Indeed, none of the cases the Government cites in support of its position address statutes like § 1503 that, when applied retrospectively, completely eliminated jurisdiction over a particular type of claim. (U.S. at 22-23). Rather, those statutes provided for alternative fora to determine the parties' rights and liabilities. *See Bruner v. United States*. 343 U.S. 112, 115, 116-17 (1952) (by requiring that actions by officers of the United States to recover salary and other compensation be submitted to the Court of Claims rather than district courts,

"Congress has not altered the nature or validity of petitioner's rights or the Government's liability but has simply reduced the number of tribunals authorized to hear and determine such rights and liabilities"); *Hallowell v. Commons*, 239 U.S. 506, 507-08 (1916) (transfer of authority to resolve Indian claims from courts to Secretary of the Interior); *Assessors v. Osbornes*, 76 U.S. 567, 572 (1869) (action for illegal assessment of taxes could be brought in state court); *Ex parte McCardle*, 74 U.S. 506, 514 (1868) (statute simply removed from the Supreme Court's appellate jurisdiction final decisions of the circuit courts); *Sherman v. Grinnell*. 123 U.S. 679, 680 (1887) (same).

Moreover, the Government's position finds no support among each of the federal courts of appeals to have considered this issue. In *Matthews v. Kidder, Peabody & Co., Inc.*, 161 F.3d 156 (3d Cir. 1998), the Third Circuit concluded that a statute that "[destroys] jurisdiction where [it] previously existed . . . speaks not just to the power of a particular court but to the substantive rights of the parties as well" and thus had an improper retroactive effect. *Id.* at 165-66 (citation omitted); *see also Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000) (Ninth Circuit construed the same statute, and came to the same conclusion as to its retroactivity, as the Third Circuit in *Matthews*). More recently, in *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003), the Second Circuit, rejecting defendants' claims that the presumption against retroactivity applies only to jurisdiction-creating statutes, held that the FSIA's application to that case was impermissibly retroactive because it "fully barred

claims that previously could have been adjudicated in the United States." *Id.* at 186.

Next, the Government makes the equally baseless claim that the presumption against retroactivity is *per se* inapplicable to legislation that, like § 1503, touches upon the foreign policy interests of the United States. (U.S. at 13-14, 16-17). Relying on *The Schooner Peggy*. 5 U.S. 103 (1801), the Government argues that in the foreign affairs context, courts should give immediate effect to new legislation regardless of their retroactive effect. (U.S. at 13). The Government ignores, however, that the *Landgraf* Court made clear that the Supreme Court's "application of' the law in effect' at the time of [its] decision in *Schooner Peggy* was simply a response to the language of the statute," which "*unambiguously* provided for the restoration" of a French vessel that had been seized in American waters, but had not yet been "definitively condemned." *Landgraf*, 511 U.S. at 273 (emphasis added).

The Government also fails to consider that courts have routinely applied the presumption against retroactivity in cases involving foreign affairs. In fact, the D.C. Circuit did so just last year in the case of *Hwang Geum Joo v. Japan*, 332 F.3d 679, 682-86 (D.C. Cir. 2003), in which the Court concluded that the FSIA does not apply retroactively to events occurring before 1952, when the United States adopted a restrictive theory of sovereign immunity. Still other courts also have applied the framework set out in *Landgraf/Lindh* to the FSIA (*see, e.g., Abrams v. Societe Nationale des Chemins de Fer Francais*. 332 F.3d at 186-87; *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986); *Ministry of Defense & Support for the Armed Forces of*

the Islamic Republic of Iran v. Cubic Defense Svs., 236 F. Supp. 2d 1140, 1145 n.2 (S.D. Cal. 2002)), and to statutes that address foreign affairs generally. *See, e.g., Havana Club Holding, S.A. v. Galleon S.A.*, 203 F.3d 116, 128-29 (2d Cir. 2000); *Cernuda v. Heavey*, 720 F. Supp. 1544, 1553 (S.D. Fla. 1989).

Implicitly recognizing the folly of its arguments, the Government next contends that the presumption against retroactive legislation is inapplicable to § 1503 because although, in its view, § 1503 would eliminate all Plaintiffs' right to seek redress from judicial tribunals, Plaintiffs would still be left with alternative fora to determine the parties' rights and liabilities. (U.S. at 23). Although the Government in this case has failed to elucidate exactly what that alternative forum might be, in *Acree v. Republic of Iraq*, currently pending before the D.C. Circuit, the Government has explained that Plaintiffs' claims may be resolved through "espousal" by the Executive Branch.[7]

To be sure, this Circuit has held that a statute which "takes away jurisdiction from the federal courts and vests exclusive authority in an executive agency to resolve certain disputes [is] considered a 'jurisdictional rule, that simply changes the tribunal that is to hear the case." *LaFontant v. INS*, 135 F.3d 158, 162 (D.C. Cir. 1998). However, "espousal"—far from the "tribunal" contemplated by *Landgraf*, *Hughes* and their progeny - is merely a discretionary remedy subject to the whim of the Executive Branch, and therefore cannot save § 1503 from the presumption against retroactivity.

---

[7] Oral argument in *Acree* took place on April 7, 2004.

In international law, "espousal" describes the mechanism whereby one government adopts or "espouses" and settles the claim of its nationals against another government. *See generally Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1522-23 (D.C. Cir. 1984). Significantly, however, the decision of whether to "espouse" such claims lies solely within the President's discretion. There is no guarantee that the President will do so, nor is there any guarantee that the foreign nation at issue will agree. And, as the Government itself has conceded in *Acree*. unlike a judicial or traditional administrative tribunal, "espousal" provides no guarantees of process or even a fundamental consideration of the rule of law.[8] Plainly, then, under the reading advanced the by the Government, section 1503 would not simply transfer to another tribunal the power to determine Plaintiffs' claims. To the contrary, if applied retrospectively, § 1503 would effectively eliminate Plaintiffs' right of redress for the severe damage

---

[8] In its brief in *Acree*, the Government noted that "[t]o be sure, the form of such espousal may remain unclear at this juncture." (U.S. Acree at 44). Accordingly, the narrow prospect of "espousal" cannot be equated with the agency fora approved by courts in other jurisdiction-ousting cases. For example, in *LaFontant*, although Congress eliminated judicial review of deportation orders, it vested full, non-discretionary authority to issue such orders with an Immigration Judge at the Bureau of Immigration Affairs. *See LaFontant v. INS*. 135 F.3d at 164-65. And in *Hallowell*. although the statute removed federal courts' jurisdiction over issues of intestacy among Native Americans, it provided that the "Secretary of Interior upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent." Act of June 25, 1910, 36 Stat. 855, ch. 431 (1910). *See Hallowell v. Commons*, 239 U.S. at 508.

inflicted by the Republic of Iraq, a result this Court must not sanction.

Finally, the Government suggests that the presumption against retroactivity is not applicable to § 1503 because Plaintiffs have no settled expectations as to their ability to litigate their actions in U.S. courts under § 1605(a)(7). (U.S. at 15-16). This argument ignores the D.C. Circuit's recent decision in *Hwang Geum Joo*, which recognized the "settled expectations" of foreign nations with respect to their immunity from suit in U. S. courts even though our foreign policy interests might later change. See 332 F.3d at 684. It is incongruous to suggest that Plaintiffs, as citizens of this country, are not entitled to a similar "settled expectation" as to their ability to seek redress in U.S. courts for the suffering inflicted by Iraq.

Indeed, § 1605(a)(7) expressly provides that jurisdiction over suits against a foreign state is based upon that state's designation as a sponsor of terrorism "at the time the act occurred." The significance of this temporal phrase is two-fold. First, it was plainly intended to preserve the jurisdiction of U.S. courts for claims involving, *inter alia*, hostage-taking and torture in the event the United States later decertified the foreign nation as a state sponsor of terrorism. Second, § 1605(a)(7) abrogated the immunity of foreign states for acts of hostage-taking and torture committed before the enactment of the Flatow amendment in 1996 so long as those states were designated as terrorist nations at the time the act occurred. Thus, contrary to the Government's claims, it is immaterial that nations like Iraq possessed sovereign immunity at the time of the conduct at

issue. (U.S. at 15). As the Government acknowledges, Iraq was designated a state sponsor of terrorism in 1990. (U.S. at 4 n.2). Thus, from 1996 forward, Plaintiffs in this case, as well as plaintiffs generally, had a "settled expectation" that they could prosecute their claims against Iraq, without regard to the sovereign immunity, so long as that conduct occurred after 1990.

The Government further seeks to defeat Plaintiffs' "settled expectations" by pointing out that the President had the authority to preclude or settle Plaintiffs' claims by executive agreement. (U.S. at 13-14). This fact is of no import, however, because, as a technical matter, the political branches have the power to abolish any cause of action at any time. Thus, the notion that Congress and the Executive Branch could theoretically compromise the claims of these Plaintiffs or any others is simply not sufficient to defeat Plaintiffs' "settled expectation" that their claims maybe heard in U.S. courts.

2. Congress Never Clearly Expressed an Intent to Apply § 1503 Retroactively

Given the retroactive effect of § 1503, this Court must next determine whether Congress manifested an intent to apply this legislation retrospectively. As the Supreme Court has stated, "[t]he standard for finding such unambiguous [Congressional] direction is a demanding one." *INS v. St. Cyr*, 533 U.S. 289, 316 (2001). Indeed, the Court has only found such intent in cases involving legislation with "statutory language that was *so clear that it could sustain only one interpretation*." *Lindh*, 521 U.S. at 329 n.4 (emphasis added). Applying this rigorous standard, the Government has not, and indeed cannot,

demonstrate clear Congressional intent to apply § 1503 retrospectively.

The Government submits that the language of § 1503, phrased using both the present tense and present perfect tense, was "plainly" intended to authorize the President to restore retrospectively Iraq's sovereign immunity for conduct occurring, and actions filed, before the statute was passed. (U.S. at 9-10). But the language on which the Government's theory rests—"make inapplicable" and "countries that have supported terrorism"—does not unambiguously communicate Congress' intent to apply this section to all cases pending at the time of its enactment. To the contrary, this language is equally consistent with an intention to make inapplicable § 1605(a)(7)'s state-sponsored terrorism exception where the conduct occurred or action filed *after* the legislation became effective.[9]

Moreover, it strains credulity to suggest that Congress—well aware of its obligation to express clearly its intent to apply a statute retrospectively—would rely upon nothing more than grammatical nuance in order to manifest such intent. To the contrary, when Congress chooses to legislate

---

[9] The Government also points to *subsequent* legislation, executive orders and a United Nations Security Council Resolution as further "proof of Congress" intent to apply § 1503 retrospectively. (U.S. at 11-12). The Government's reliance on these enactments is misplaced. For one, the subsequent legislation cited by the Government (Pub. L. No. 108-106, 117 Stat. 1209) was nothing more than an appropriations bill; it was silent as to the jurisdiction of U.S. courts over actions against Iraq. And as for the executive orders and U.N. Security Council Resolution, it is anomalous to suggest that such later-enacted policy statements—not promulgated by Congress—could have any bearing on Congress' intent in enacting prior legislation.

retrospectively, it certainly knows express its intent in clear, unequivocal terms. For example, in enacting § 1605—including the state sponsored terrorism exception to sovereign immunity—Congress expressly provided that the legislation "shall apply to any cause of action arising before, on, or after the date of the enactment of this Act." 28 U.S.C. § 1605 (historical and statutory notes). See also *Reno v. American Anti-Discrimination Comm.*, 525 U.S. 471, 477 (1999) (provision removing jurisdiction to review deportation orders applied "without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings").

In the end, there is simply no evidence of the clear Congressional intent required to overcome the presumptively improper retroactive effect that would result from applying § 1503 to pending cases.

III. Plaintiffs Have Established a Viable Cause of Action Against Iraq By Operation of § 1606 of the FSIA

Citing the D.C. Circuit's recent decision in *Cicippio-Puleo v. Islamic Republic of Iraq*. 353 F.3d 1024 (2004), the Government contends that Plaintiffs' Complaint must be dismissed because it appears to rest solely on § 1605(a)(7). (U.S. at 28). The Government pays short shrift to this argument, and with good reason, as Plaintiffs' Complaint is grounded not on § 1605(a)(7), but on § 1606. That section, in turn, provides that non-immune terrorist states are liable for their misdeeds to the same extent as private individuals, and that any cause of action that could be brought against such individuals is likewise available against a terrorist state. Here, Plaintiffs' Complaint properly asserts a clause of

action for the tort of intentional infliction of emotional distress. There is nothing in the D.C. Circuit's decision in *Cicippio-Puleo* that protects terrorist states from such liability. Accordingly, the Government's argument must be rejected.

In *Cicippio-Puleo*, the children and sibling of Joseph Cicippio, an American citizen held hostage and tortured by an Iranian supported terrorist organization, sued Iran "based on claims purporting to arise under section 1605(a)(7) and the Flatow Amendment." 353 F.3d at 1027, 1028. Affirming the dismissal of plaintiffs' claims, the D.C. Circuit held that neither § 1605(a)(7) nor the Flatow Amendment—"the only provisions upon which plaintiffs rely"—"establishes a cause of action against foreign state sponsors of terrorism." *Id.* at 1033, 1027. Accordingly, the Court concluded that the plaintiffs could not "proceed on these grounds." *Id.* at 1027.

Significantly, however, the Court did not foreclose the possibility that "an alternative source of law" could support a cause of action against non-immune terrorist states. *Id.* at 1036. To the contrary, the Court found that § 1605(a)(7) "make[s] it clear that designated foreign state sponsors of terrorism *will be amenable* to suits in United States courts for acts of terrorism *in cases in which there is a viable cause of action*." *Id.* (emphasis added). The Court therefore remanded the case, allowing the plaintiffs an opportunity to amend their complaint to assert causes of action under "some other source of law, including state law."[10] *Id.*

---

[10] The D.C. Circuit's remand was in keeping with the decisions of other courts of this District, which recognize the right of plaintiffs to pursue tort claims, including the claim of intentional infliction of

Applied to the instant case, *Cicippio-Puleo* does not require dismissal of Plaintiffs' Complaint because it is premised not upon § 1605(a)(7) of the FSIA, but on § 1606.[11] Section 1606 provides, in relevant part, that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the *foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances*." 28 U.S.C. § 1606 (emphasis added). Use of the words "shall be liable" in § 1606 was clearly intended to create a cause of action.[12] As to the scope of that cause of action, § 1606 requires that terrorist states will be liable in the same manner and to the same extent as a private individual, whether under federal, state, or foreign law. *See First Nat'l City Bank v. Banco Para El*

---

emotional distress, against non-immune terrorist states. *See, e.g., Dammarell v. Islamic Republic of* Iran, 281 F. Supp. 2d 105, 194 (D.D.C. 2003); *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24, 36 (D.D.C. 2003); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 35 (D.D.C. 2001), *aff'd Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27,44, 47 (D.D.C. 2001); *Anderson v. Islamic Republic of Iraq*. 90 F. Supp. 2d 107, 113 (D.D.C. 2000).

[11] The issue of whether viable causes of action may be asserted against a non-immune state sponsor of terrorism under § 1606 is currently before the D.C. Circuit in *Kilburn v. Islamic Republic of Iran* (No. 03-7117). Oral argument is currently scheduled for May 14, 2004.

[12] *See Key Tronic Corp. v. United States*, 511 U.S. 809, 822 (1994) (Scalia, J., dissenting) ("to say that A shall be liable to B is the *express* creation of a right of action) (emphasis in original); *American Council of certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.* 185 F.3d 606, 613 (6th Cir. 1999) ("shall be liable" creates cause of action); *Underwood v. Wilson*, 151 F.3d 292, 294 (5th Cir. 1998) (same).

Comercio Exterior de Cuba, 462 U.S. 611, 622 n. 11 (1983) (where, for example, "state law provides a rule of liability governing private individuals, [§ 1606 of] the FSIA *requires* the application of that rule to foreign states in like circumstances") (emphasis added). In so doing, § 1606 in effect "instructs federal judges to find the relevant law, not to make it." *Bettis v. Islamic Republic of Iran*, 315 F.3d at 333; *see also Kilburn v. Republic of Iran*, 277 F. Supp. 2d at 36 (same).

In the instant matter, given the various jurisdictions that might claim an interest in this case, the search for the "relevant law" entails a choice-of-law analysis, applying ordinary choice-of-law principles, as to whether foreign law (here, the law of Iraq) or U.S. law applies. This issue is easily resolved because Iraq has yet to appear in this action, nor has any authority been presented as to the substance of Iraqi law. Under the Restatement (Second) of Conflicts, "where either no information, or else insufficient information, has been obtained about the foreign law, the forum will usually decide the case in accordance with its own local law...." Restatement (Second) of Conflicts § 136 cmt. h (2003); *see Banque Libanaise Pour Le Commerce v. Khreich*. 915 F.2d 1000, 1006 (5th Cir. 1990) ("absent sufficient proof to establish with reasonable certainty the substance of the foreign principles of law, the district court should apply the law of the forum").

But even if Iraq had appeared and presented proof that its law fails to recognize Plaintiffs' emotional distress claims, it would be of no import because the United States has the greatest interest in seeing its laws applied. The Restatement (Second) of Conflicts, whose approach is followed by courts of

this District,[13] requires courts to apply the law of the jurisdiction with "the most significant relationship to the occurrence . . . ." Restatement (Second) of Conflicts § 145. Plainly, under the standard set forth in the Restatement, the jurisdiction with the most significant relationship to the events at issue in this case is the United States.

As a general matter, courts of this District—recognizing that the FSIA was enacted for the purpose of creating a judicial forum through which American victims of foreign terrorism may be compensated (*see Price v. Socialist People's Libyan Arab Jamahiriya*. 294 F.3d 82,88-89 (D.C. Cir. 2002))—consistently have held that in cases against state sponsors of terrorism, the United States has a far greater interest in the application of its laws than does any other jurisdiction. *See, e.g.. Flatow. Islamic Republic of Iran*, 999 F. Supp. at 14. Moreover, the interest of the United States is even more compelling in this case given that the acts of hostage-taking and torture underlying Plaintiffs' emotional distress claims were specifically directed at American citizens in order to exact concessions from the United States government or to obtain humanitarian aid. *See, e.g.*, Complaint ¶ 6. Accordingly, application of U.S. law is warranted in this case.

Applying U.S. law, it is well settled that the tort of intentional infliction of emotional distress is universally accepted under principles of common law. In defining the scope or elements of this tort,

---

[13] *See, e.g., Wagner v. Islamic Republic of Iran*. 172 F. Supp. 2d 128, 134 (D.D.C. 2001): *Flatow v. Islamic Republic of Iran*. 999 F. Supp. 1, 14 (D.D.C. 1998).

"federal courts in FSIA . . . cases have accepted § 46 of the Restatement (Second) of Torts as a proxy for state common law of intentional infliction of emotional distress." *Bettis v. Islamic Republic of Iran*. 315 F.3d at 333.

Significantly, in cases brought by immediate family members of victims of terrorism or hostage-taking under the FSIA, courts of this District have concluded that "the plaintiff need not be present at the place of outrageous conduct." The physical presence requirement is relaxed to include awareness of the fact that the family member has been abducted and held hostage. It does not require physical presence at the prison where the hostages were held. *See Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 271 (D.D.C. 2003); *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d at 36; *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d at 49-50. Accordingly, because U.S. law provides the rule of decision in this case, that law provides Plaintiffs with an actionable common law claim for intentional infliction of emotional distress.

CONCLUSION

For the reasons set forth herein, the Government's suggestion that the EWSAA deprives this Court of jurisdiction over this action, or that Plaintiffs' Complaint fails to state a viable cause of action against Iraq, must be rejected.

Dated April 15, 2004.

Respectfully submitted,

Andrew C. Hall, Esq.
FL Bar # 111480
1428 Brickell
Penthouse
Miami, FL 33131
Tel: (305) 374-5030
Fax: (305) 374-5033

James Cooper-Hill, Esq.
Texas Bar # 04789300
1723 Cherry Street
Rockport, Texas 78382
Tel: (361) 729-3566
Fax: (361) 729-7120

Nelson M. Jones, Esq.
D.C. Bar # 320266
440 Louisiana, Suite 475
Houston, Texas 77002
Tel: (713) 224-5323
Fax: (713) 224-8525

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was sent on this 14th day of April, 2004, via facsimile and U.S. Mail to Andrew S. Tannenbaum, Trial Attorney, U.S. Department of Justice, Civil Division, P.O. Box 883, 20 Massachusetts Ave., NW, Washington, D.C. 20044.

Andrew C. Hall, Esq.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, *et al.*, Plaintiffs, v. REPUBLIC OF IRAQ, Defendant.	Civil Action No. 03-0215 (JDB)

UNITED STATES' REPLY IN SUPPORT OF ITS STATEMENT OF INTEREST

* * * * *

INTRODUCTION

In May 2003, the President made Section 1605(a)(7) of the Foreign Sovereign Immunities Act ("FSIA") inapplicable to Iraq, thereby restoring Iraq's sovereign immunity from this action. Pursuant to the Court's invitation, the United States filed a Statement of Interest demonstrating the lack of prospective subject-matter jurisdiction in this matter, as well as the crucial foreign policy goals underlying the President's determination and the Emergency Wartime Supplemental Appropriations Act of 2003 ("EWSAA"), Pub. L. No. 108-11, § 1503,

the statute that authorized it. *See* Statement of Interest of the United States ("U.S. St.").

In response, plaintiffs argue that Section 1503 of the EWSAA violates the Presentment Clause by authorizing the President to repeal Section 1605(a)(7) of the FSIA. *See* Plaintiffs' Response to Statement of Interest of the United States ("Pl. Br.") at 3-6. Plaintiffs further contend that Section 1503 is inapplicable to this case as a matter of statutory construction, *see id.* at 7-12, and that even if Section 1503 does apply, the restoration of Iraq's sovereign immunity from this action would be impermissibly retroactive, *see id.* at 13-20.

Plaintiffs' contentions are without merit. Section 1503 does not allow the President to repeal or amend legislation, but rather constitutionally authorizes the President to waive a narrow set of laws as they apply to Iraq. Moreover, plaintiffs' claim that Section 1503 does not apply as a matter of construction is directly contrary to the statute's plain text, which clearly authorizes the President to make Section 1605(a)(7) immediately inapplicable to Iraq. Indeed, the Supreme Court has repeatedly applied similar jurisdictional-ousting statutes to pending cases in the absence of express language to the contrary. Furthermore, the restoration of Iraq's sovereign immunity is prospective, not retroactive, in effect, and, in any event, a presumption against retroactivity cannot apply where it would frustrate important foreign policy determinations of the political branches. Accordingly, the Court should give immediate and full effect to the President's determination to restore Iraq's sovereign immunity from pending Section 1605(a)(7) claims, and

consequently dismiss this case for lack of subject-matter jurisdiction.

ARGUMENT

I. SECTION 1503 DOES NOT VIOLATE THE PRESENTMENT CLAUSE

Plaintiffs argue that Section 1503 of the EWSAA improperly delegates legislative power by authorizing the President to repeal legislation. *See* Pl. Br. at 3-6. Specifically, plaintiffs claim that the effect of Presidential Determination No. 2003-23 was to repeal Section 1605(a)(7) "as it applies to Iraq," in violation of the Presentment Clause. Pl. Br. at 3. Plaintiffs' argument is unavailing. Rather than allowing the President to repeal statutes, Section 1503 authorizes the President to make inapplicable a limited number of statutes (those that "apply to countries that have supported terrorism") in a limited range of circumstances (insofar as they apply "with respect to Iraq"), and in an area where he enjoys independent constitutional authority. The statutes made inapplicable, such as Section 1605(a)(7), remain valid law and are fully applicable to all other designated state sponsors of terrorism. *See* 15 C.F.R. § 750.4(b)(6)(i) (listing seven countries as state sponsors of terrorism).

Section 1503, therefore, has no resemblance, in either form or effect, to the line item veto power at issue in *Clinton v. City of New York*, 524 U.S. 417 (1998). Rather, it is akin to a wide range of statutes that allow the President, in the area of foreign affairs, to waive, suspend, or make inapplicable, various provisions of law. *See, e.g., United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322-28 & n.2 (1936) (canvassing laws, contained in

"[p]ractically every volume of the United States Statutes," leaving the conduct of foreign affairs to the judgment of the President); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374, 375 (2000) (discussing provision that allowed the President to "respond to change by suspending sanctions [against Burma] in the interest of national security"); 22 U.S.C. § 7207(a)(3) (President may waive prohibition on assistance for commercial exports to Iran, Libya, North Korea, or Sudan "to the degree the President determines that it is in the national security interest of the United States to do so, or for humanitarian reasons"); *cf.*, *e.g.*, 42 U.S.C. § 7545(k)(2)(B) (EPA may waive, in a limited geographical area, requirement regarding oxygen content of gasoline).

The crux of plaintiffs' argument is that Section 1503 does not meet what plaintiffs claim are three independent requirements, established by *Clinton*, for a permissible delegation of power to the President: the delegation must depend on a condition not existing at the time of its enactment; the President must be required to act upon the condition's occurrence; and the President must be implementing congressional policy. *See* Pl. Br. at 5. As already explained, *Clinton* is inapplicable because Section 1503 does not grant the President the power to repeal or amend statutes. In any event, the Supreme Court did not hold or even suggest that the three considerations relied upon by plaintiffs constitute any sort of generally applicable test necessary to sustain all delegations of power to the President. Rather, the Court simply held them sufficient to distinguish the Line Item Veto Act struck down in Clinton from the delegation upheld in

Field v. Clark, 143 U.S. 649 (1892). *See Clinton*, 524 U.S. at 443-44.

Moreover, whatever *Clinton* might have held with respect to domestic affairs, it expressly distinguished statutes relating to foreign policy and recognized that "in the foreign affairs arena, the President has 'a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.'" 524 U.S. at 445 (quoting *Curtiss-Wright*, 299 U.S. at 320). *Clinton* thus reaffirmed the long-standing principle that Congress may authorize the President to act "in respect of subjects affecting foreign relations, [by] either leav[ing] the exercise of the power to his *unrestricted* judgment, or provid[ing] a standard far more general than that which has always been considered requisite with regard to domestic affairs." *Curtiss-Wright*, 299 U.S. at 324 (emphasis added); *see also Loving v. United States*, 517 U.S. 748, 772 (1996) (holding that "the same limitations on delegation do not apply where the entity exercising the delegated authority itself possesses independent authority over the subject matter") (internal quotation marks omitted). Accordingly, the Supreme Court has never held unconstitutional a delegation of foreign affairs power to the President, and it has acknowledged the "unwisdom" of attempts to restrict the President's discretion in foreign affairs, because it is the President, "not Congress, [who] has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war." *Curtiss-Wright*, 299 U.S. at 321, 320; *accord Clinton*, 524 U.S. at 445. Section 1503 is plainly constitutional under these well-established principles. *See Smith v. Fed. Reserve Bank of N.Y.*,

280 F. Supp. 2d 314, 323-24 (S.D.N.Y.) (upholding Section 1503 as constitutional under the Presentment Clause), *aff'd on other grounds*, 346 F.3d 264 (2d Cir. 2003).

Plaintiffs' constitutional challenge is particularly misguided because Section 1503, insofar as it applies to 28 U.S.C. § 1605(a)(7), simply grants the President (with respect to Iraq alone) a specific power that the Executive Branch had exercised for nearly two centuries, without any delegation from Congress and without even a hint of constitutional difficulty. *See* U.S. St. at 7-8. Prior to the FSIA's enactment in 1976, the Executive Branch determined whether foreign sovereigns should be accorded immunity from suit on a case-by-case basis, and the courts were bound to accept those determinations and "surrender [their] jurisdiction." *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945); *accord Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486-88 (1983). Section 1503 is entirely consistent with that traditional Executive Branch power.[1] Moreover, even under current law, suits can be brought pursuant to Section 1605(a)(7) only on the basis of an Executive Branch designation of the particular foreign state as a sponsor of terrorism. It therefore followed naturally that, in light of intervening foreign policy

---

[1] The longstanding pedigree of the Executive Branch's authority over foreign sovereign immunity also refutes plaintiffs' claim, *see* Pl. Br. at 5 n.3, that Section 1503 impermissibly interferes with the power of Congress to define federal court jurisdiction. Prior to the enactment of the FSIA, courts "consistently . . . deferred" to the foreign sovereign immunity determinations of the Executive Branch. *Verlinden*, 461 U.S. at 486. There is no constitutional impediment for Congress to restore, with respect to Iraq, this traditional Executive Branch power.

developments, Congress would authorize the President to render inapplicable a statute that applied to Iraq in the first instance only by virtue of an Executive Branch determination.[2]

II. SECTION 1503 PROSPECTIVELY AND IMMEDIATELY RESTORES IRAQ'S SOVEREIGN IMMUNITY FROM PENDING TERRORISM-RELATED CLAIMS

Plaintiffs argue that Section 1503 could not have authorized the President "retrospectively to oust this Court of jurisdiction in this case." Pl. Br. at 6. To support this claim, plaintiffs first rely on several canons of statutory construction, which they contend render Section 1503 wholly inapplicable to this matter. *See* Pl. Br. at 6-12. Plaintiffs further argue that even if Section 1503 were applicable, the restoration of Iraq's immunity from this case would have an impermissible retroactive effect in the absence of a clear statement that Congress intended such a result. *See* Pl. Br. at 13-20.

Plaintiffs' arguments are without merit. In invoking various canons of construction, plaintiffs inject their own understanding of the statutory purpose of Section 1503 while ignoring the otherwise plain text. There can be no question that Section 1605(a)(7) of the FSIA is a "provision of law that applies to countries that have supported terrorism,"

---

[2] Indeed, the fact that the President effectuated a policy choice authorized by Congress in Section 1503 is yet another factor that distinguishes this case from *Clinton*, where the President and Congress were at odds with respect to the provision as to which the President exercised the veto. *See Smith*, 280 F. Supp. 2d at 324 ("Unlike in *Clinton*, President Bush is carrying out, not rejecting a policy made by Congress based on the drastically changed circumstances in Iraq.").

and thus squarely within the set of statutes that Congress unambiguously authorized the President to make immediately inapplicable to Iraq. *See* U.S. St. at 8-9. Moreover, plaintiffs' entire argument is based on the faulty premise that Section 1503 applies retrospectively to this action. It does not. Rather, it applies *prospectively* to restore immediately Iraq's immunity from the date of the Presidential Determination, thereby ousting the Court of further jurisdiction over plaintiffs' claims. *See* U.S. St. at 9-12. Because the restoration of Iraq's sovereign immunity does not have retroactive effect, a clear statement rule does not apply. Such a rule, in any event, would contravene established Supreme Court precedent by interfering with the ability of the President to conduct foreign policy. *See* U.S. St. at 13-18.

A. By its Plain Language, Section 1503 Authorized the President to Make Section 1605(a)(7) Immediately Inapplicable to Iraq

Plaintiffs invoke four canons of statutory construction which they claim wholly preclude the application of Section 1503 to this case. But Section 1503's application is clear. By its plain language, Section 1503 authorized the President to "make inapplicable with respect to Iraq . . . any . . . provision of law that applies to countries that have supported terrorism." Use of the word "any" signifies breadth, *see United States v. Monsanto*, 491 U.S. 600, 609 (1989), and Section 1605(a)(7) of the FSIA, which abrogates foreign sovereign immunity for certain claims against countries designated by the Secretary of State as state sponsors of terrorism, is unquestionably "a provision of law that applies to countries that have supported terrorism." *See* U.S.

St. at 8-9. Also clear is Section 1503's application to plaintiffs' pending claims. As previously discussed, statutes that oust jurisdiction require the immediate dismissal of pending cases, absent an express reservation to the contrary. *See* U.S. St. at 22-25.

Plaintiffs' proposed construction of Section 1503 thus finds no support in the text, purposes or context of that provision, in the understanding of that provision embraced by the President, or even in the host of canons that they erroneously invoke. Indeed, plaintiffs have ignored what the Supreme Court has called the "cardinal" canon: "[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992); *accord Beach v. Ocwen Fed. Bank*, 523 U.S. 410, 417 (1998) (where statutory meaning was clear, there was "no reason . . . even to resort to the canons of construction that we use to resolve doubtful cases").

Plaintiffs first claim that there is a "very strong presumption" against interpreting appropriations legislation to "substantively change existing law." Pl. Br. at 8. But Section 1503 is not itself an appropriations rider or funding limitation; it says nothing about the appropriation or expenditure of federal funds. Instead, it expressly authorizes the President to make defined statutes "inapplicable with respect to Iraq." Moreover, various other provisions of the EWSAA unquestionably do "substantively change existing law." *See, e.g.*,

EWSAA § 2105, 117 Stat. at 589 (amending 7 U.S.C. § 6506 to allow labeling of wild seafood as "organic"); EWSAA § 2503, 117 Stat. at 599 (amending 20 U.S.C. § 6537(3) to change definition of "low-income individual"). Section 1503 is thus entirely unlike the provisions considered in such cases as *Building & Construction Trades Department AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir. 1992), and *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000), where the D.C. Circuit, addressing appropriations riders that restricted the expenditure of funds in conjunction with particular programs, declined to construe such restrictions as implicitly repealing the entire underlying program.

In any event, appropriations statutes "can substantively change existing law," *Bldg. & Constr. Trades Dep't*, 961 F.2d at 273, and whether they do so is a straightforward question of statutory interpretation. As explained by the General Accounting Office—"whose accumulated experience and expertise in the field of government appropriations gives special weight to its opinions," *Int'l Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984) (citation omitted)—courts should discount "the occasional sweeping statement such as 'appropriations acts cannot change existing law.' Such statements can be misleading, and should be read in the context of the facts of the particular case." 1 GAO, *Principles of Federal Appropriations Law*, 2-56 (2d ed. 1991). Here, Section 1503 gave specific and clear authority to the President to make certain statutes inapplicable to Iraq, and that express provision should be given its full and natural effect.

Relying on a second so-called canon of construction, plaintiffs next attempt to characterize the operative language of Section 1503 as a mere "subordinate proviso." Pl. Br. at 8. Plaintiffs essentially contend that, because the words "Provided that" introduce the clause authorizing the President to make certain statutes inapplicable to Iraq, the scope of that authority is restricted by the antecedent clause authorizing the President to "suspend the application of any provision of the Iraq Sanctions Act of 1990." Thus, under plaintiffs' restrictive reading, the "sole focus" of Section 1503 as a whole, including the clause at issue here, is the removal of barriers to aid and commerce imposed on the regime of Saddam Hussein. Pl. Br. at 9.

Plaintiffs' own authority, however, refutes the premise that a proviso is necessarily restrictive. In *United States v. Morrow*, 266 U.S. 531 (1925), the Supreme Court did not state any general rule of law; instead, the Court relied on "the plain meaning" of the proviso at issue. *Id.* at 534. Moreover, *Morrow* itself made clear that a clause appearing to be a proviso is "sometimes used to introduce independent legislation," and that courts must look to the "entire context" of the statute to determine whether it is used for that purpose. *Id.* at 535; *see also* 2A Norman J. Singer, *Sutherland's Statutes & Statutory Construction*, § 47:08, at 235-36 (6th ed. 2000) (provisos "are construed using the same general criteria of decision applied to other kinds of provisions").

By its plain text, the clause at issue here authorizes the President to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or *any other provision of law*

that applies to countries that have supported terrorism" (emphasis added). If Congress wanted to limit that broad language to specific statutes dealing only with aid or trade, it could have done so explicitly.[3] Moreover, that clause—which plaintiffs mischaracterize as a restrictive "proviso"—necessarily operates independently of the authority granted in the introductory clause to "suspend the application of any provision of the Iraq Sanctions Act of 1990." Pub. L. No. 108-11, § 1503. The Foreign Assistance Act prohibits aid to countries determined by the Secretary of State to support international terrorism. *See* 22 U.S.C. § 2371(a). The Iraq Sanctions Act, passed nearly two months after the Secretary of State designated Iraq as a state sponsor of terrorism for purposes of the Foreign Assistance Act, *see* 55 Fed. Reg. 37793 (Sept. 13, 1990), independently imposed new sanctions on Iraq and required the complete enforcement against Iraq of specified statutes, including but not limited to the Foreign Assistance Act. *See* Pub. L. No. 101-513 § 586F(c)(1). The independent nature of the authorities granted in the two separate clauses is thus plain; for example, if application of the Iraq Sanctions Act alone had been suspended, the Foreign Assistance Act and other relevant provisions would still have remained in force against Iraq. The separate clauses,

---

[3] For the same reason, the March 25, 2003 letter from the OMB Director, *see* Pl. Br. at 10, does not support plaintiffs' restrictive construction. If Congress wanted to limit Section 1503's applicability to the statutes listed in the letter—which did not purport to be an exhaustive list, but simply cited examples of provisions that may be made inapplicable—it could have done so. Instead, it provided a much broader authorization, and that clear text controls.

therefore, must be given the substantive effect required by their plain meaning.

Furthermore, the Iraq Sanctions Act itself is not limited to restrictions on aid and trade. Indeed, the statute requires the enforcement of "*all other provisions of law* that impose sanctions against a country which has repeatedly provided support for acts of international terrorism." *Id.* (emphasis added). Federal law imposes a wide range of adverse legal consequences on such countries, including restrictions on government contracts, individual grants and fellowships, and foreign tax credits, *see, e.g.*, 10 U.S.C. § 2249a(a)(1)-(2); *id.* § 2327(b); 15 U.S.C. § 7410(b); 22 U.S.C. § 2780(a)(2); *id.* § 2780(a)(1); 26 U.S.C. § 901(j)(2)(iv), 50 U.S.C. app. § 2405, as well as increased exposure to judgments, 28 U.S.C. § 1605(a)(7), and execution or attachment, *id.* § 1610; Pub. L. No. 107-297, § 201, 116 Stat. 2322. Section 1605(a)(7) thus clearly falls within the broad category of sanctions addressed by the Iraq Sanctions Act. Indeed, two district courts have already held that Section 1503 authorized the President to make inapplicable to Iraq Section 201 of the Terrorism Risk Insurance Act of 2002 ("TRIA"), Pub. L. No. 107-297, 116 Stat. 2322, which has nothing to do with either aid or trade, but rather allows for the execution or attachment of blocked assets of terrorist parties in order to satisfy Section 1605(a)(7)-related judgments. *See Smith*, 280 F. Supp. 2d at 323 (rejecting argument that EWSAA was intended to apply only to laws imposing sanctions on Iraq because "[e]ven if true, the plain meaning of the language Congress chose to use is broad . . . and undeniably encompasses the TRIA"), *aff'd on other grounds*, 346 F.3d 264 (2d Cir. 2003);

Acree v. Snow, 276 F. Supp. 2d 31, 32 (D.D.C.) (Section 1503 authorized President to make TRIA inapplicable to Iraq, "since it is a law that applies to Iraq as a designated state sponsor of terrorism"), *aff'd on other grounds*, 78 Fed. Appx. 133 (D.C. Cir. 2003).

Plaintiffs claim support from the various other clauses in Section 1503, *see* Pl. Br. at 10 n.6, but the breadth and variety of those clauses undercuts their argument even further. Section 1503 contains nine different clauses, the last eight of which are introduced by the words "Provided" or "Provided further." These clauses address a wide range of topics, including but not limited to the Iraq Sanctions Act, the Iran-Iraq Arms Non-Proliferation Act of 1992, various provisions of the Foreign Assistance Act, voting provisions, notice provisions, and sunset provisions.[4] This pattern underscores that the words "Provided" or "Provided further" serve merely to separate dissimilar independent clauses, and that Section 1503 addresses no predominant topic—

[4] To be sure, some of the clauses do simply cabin the scope of authority granted to the President in another clause. For example, suspension of the application of the Iraq Sanctions Act, together with a decision to make inapplicable to Iraq section 620A of the Foreign Assistance Act and other laws restricting exports to Iraq, would allow the export of military equipment, but the fourth clause of Section 1503 continues to prohibit the export of military equipment. Other clauses, however, clearly serve a different purpose. For example, the fifth clause of Section 1503 provides that section 307 of the Foreign Assistance Act (22 U.S.C. § 2227) "shall not apply with respect to programs of international organizations for Iraq." 117 Stat. at 579. Like the third clause, this provision removes a freestanding legal sanction imposed on Iraq and cannot be characterized as merely implementing or constraining the authority to suspend application of the Iraq Sanctions Act.

related to trade or aid or otherwise—that could sensibly limit clear statutory text.[5]

The third canon of construction invoked by plaintiffs provides that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." Pl. Br. at 11. Plaintiffs err, however, in contending that this canon supports their proposed construction of Section 1503. In authorizing the President to make inapplicable to Iraq section 620A of the Foreign Assistance Act and "any other provision of law that applies to countries that have supported terrorism," Congress itself specified the relevant criterion of similarity between section 620A and "other" provisions encompassed by Section 1503. Like section 620A, 28 U.S.C. § 1605(a)(7) is a "provision of law that applies to countries that have supported terrorism." These provisions are thus "similar in nature" in the only sense deemed relevant by Congress. Under these circumstances, the canon invoked by plaintiffs simply does not advance their proposed construction. *See, e.g., Norfolk and Western Ry. Co. v. Am. Train*

---

[5] Plaintiffs are also wrong to suggest that Section 1503 merely provided an alternative mechanism for rescinding the existing designations of Iraq as a state sponsor of terrorism. *See* Pl. Br. at 10. As previously explained, *see* U.S. St. at 12-13, rescinding a state's terrorist designation may have a narrower substantive effect than making a provision of law entirely inapplicable to Iraq, as is the case with Section 1605(a)(7). Had Congress intended to provide only for such a rescission, Section 1503 could easily have been written to accommodate that intent. Instead, Congress used much broader language, authorizing the President to render terrorism-based statutes generally "inapplicable."

Dispatchers Ass'n, 499 U.S. 117, 129 (1991) (principle of *ejusdem generis* "does not control . . . when the whole context dictates a different conclusion").

Finally, plaintiffs contend that because Section 1605(a)(7) specifies its own temporal application (to misconduct that occurred when a foreign government was designated as a state sponsor of terrorism), that "specific" provision is presumptively not subject to the assertedly more "general" provision of Section 1503. Pl. Br. at 11-12. That analysis is mistaken. The cases cited by plaintiffs address the question of how to reconcile competing statutory provisions or schemes when each is silent about its effect on the other. *See, e.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Here, however, there is no question regarding how to reconcile competing statutes. Congress itself specified that Section 1503—a provision narrowly addressed to changed circumstances in Iraq—makes inapplicable any "provision of law that applies to countries that have supported terrorism." Because Section 1605(a)(7) is clearly such a provision, Section 1503 authorized the President to make it inapplicable to Iraq. The only further question presented is the temporal scope not of Section 1605(a)(7), but of the Presidential Determination that made that provision inapplicable.

B. The Restoration of Iraq's Sovereign Immunity is Not Impermissibly Retroactive

Plaintiffs argue that even if Section 1503 does apply to this case, the restoration of Iraq's sovereign immunity would have an impermissible retroactive effect in the absence of a clear statement that Congress intended such a result. *See* Pl. Br. at 13-20. As already explained, however, the restoration of

Iraq's sovereign immunity is prospective, not retroactive, in effect. *See* U.S. St. at 15-16. A clear statement rule, therefore, does not apply.[6] Such a rule, in any event, would violate established Supreme Court precedent by interfering with the ability of the President to conduct foreign policy. *See id.* at 16-18.

1. The Restoration of Iraq's Sovereign Immunity is Not Retroactive in Effect

When a case implicates a statute enacted after the events in suit, such as here, application of the statute is precluded based on a presumption against retroactivity only if Congress has not clearly prescribed the statute's reach *and* the statute would have a genuinely retroactive effect. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994); *Lindh v. Murphy*, 521 U.S. 320, 324 (1997). A statute, however, is not deemed to have retroactive effect "merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Landgraf*, 511 U.S. at 269 (citation omitted). Rather, a statute has a true retroactive effect "when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *INS v. St. Cyr*, 533 U.S. 289, 321 (2001) (internal quotation marks omitted). Moreover, "the judgment whether a particular statute acts retroactively should be

[6] *See Joo v. Japan*, 332 F.3d 679, 683 (D.C. Cir. 2003) (recognizing that it is only necessary to reach the clear statement question if the court determines that "the statute would have a retroactive effect"; otherwise, the "inquiry ends and we apply the statute").

informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* (internal quotation marks omitted).

Under these well-established principles, Section 1503 and Presidential Determination No. 2003-23 are plainly not retroactive in effect. By making Section 1605(a)(7) of the FSIA inapplicable to Iraq, the President and Congress did not impose any new legal duty, liability or burden with respect to the past conduct of plaintiffs. Nor did they take away any substantive rights of plaintiffs or upset any settled expectations.[7] Rather, the legislative and executive actions immediately and prospectively restored Iraq's sovereign immunity from all Section 1605(a)(7) suits as of May 7, 2003, the date of the Presidential Determination. Accordingly, from that date forward, the Court no longer had subject-matter jurisdiction over plaintiffs' claims.

Plaintiffs argue that the restoration of Iraq's immunity does have a retroactive effect because it interferes with their purported "settled expectation" that they could litigate their claims as of 1996, when Section 1605(a)(7) was enacted. Pl. Br. at 19. But as already discussed, *see* U.S. St. at 13-14, and as plaintiffs essentially concede,[8] the President and Congress have the unquestionable authority to preclude or settle hostage-related claims as the Nation's foreign policy requires. Such claims, even

[7] Indeed, as recently made clear by the D.C. Circuit, Section 1605(a)(7) is merely jurisdictional and therefore does not afford plaintiffs any substantive right or cause of action at all. *See Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004).

[8] *See* Pl. Br. at 17 ("[T]he decision of whether to 'espouse' such claims lies solely within the President's discretion.").

though pending in courts of the United States, may be precluded without the consent of the claimants, *see Dames & Moore v. Regan*, 453 U.S. 654, 679-80, 686, and without any compensation provided in return, *see Abrahim-Youri v. United States*, 139 F.3d 1462, 1468 (Fed. Cir. 1997). Under such circumstances, it simply cannot be said that plaintiffs had any substantive right or settled expectation in their ability to litigate to judgment a Section 1605(a)(7) suit against Iraq. A right is not vested, or even a right at all, if, for the good of the Nation, it can be taken away at any time and without any redress.[9]

Plaintiffs rely on *Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003), in support of their argument that they had "settled expectations," *see* Pl. Br. at 18, but that case is easily distinguishable from the facts at issue here. In *Joo*, a suit against Japan for sexual slavery and torture that occurred before and during World War II, the D.C. Circuit held that the application of the commercial activity exception to the FSIA,

---

[9] Plaintiffs try to undercut the significance of the President's authority to settle such claims by pointing out that Congress always retains authority to abolish retroactively any cause of action. *See* Pl. Br. at 19. Plaintiffs' attempted analogy answers itself. In the domestic context, courts apply a strong presumption against retroactive legislation precisely because of the understanding that Congress does *not* generally act to upset settled expectations. But in the foreign policy context, where the President's foreign affairs power allows him to bypass ordinary legislative processes when settling claims against foreign states, there is no similar presumption that the President will not extinguish private claims as he finds necessary to further the Nation's interests. *See* Section II.B.2, *infra*. Thus, plaintiffs simply cannot claim the type of settled expectations that might be more reasonable in the domestic arena.

enacted in 1976, would have retroactive effect. *See* 332 F.3d at 683-85. Specifically, the Court ruled that subjecting Japan to a suit that it was immune from prior to 1952, when U.S. courts followed the doctrine of "absolute immunity," would impose new legal obligations on Japan and upset that nation's settled expectations that such a suit would be dismissed. *See id.* at 683-84. The Court also noted that allowing the suit to proceed via the application of the commercial activity exception would be contrary to the foreign policy determination of the United States at the time that "all claims against Japan arising out of its prosecution of World War II [we]re to be resolved through intergovernmental settlements" and "without involving the courts of the United States." *Id.* at 684-85.

Joo is thus significantly different from this case in several key respects. First, by not subjecting Japan to jurisdiction under the FSIA for pre-enactment conduct, the D.C. Circuit gave full effect to the express foreign policy of the United States that claims arising from World War II were to be resolved diplomatically and not through litigation. By declining to apply the FSIA, the Court of Appeals thus acted in a manner consistent with, not contrary to, U.S. foreign policy, and avoided enmeshing the courts in resolving World War II era-claims without the clear invitation of Congress. Here, plaintiffs are asking that the Court find that the U.S. foreign policy itself, embodied in Section 1503, has an impermissible retroactive effect by upsetting their expectations. Nothing in *Joo*, however, provides for

such protection of plaintiffs' expectations when they are in direct conflict with U.S. foreign policy.[10]

Moreover, *Joo* is precisely the kind of case—where an entity, contrary to all prior expectations, is subjected to liability years after the relevant conduct took place—that the presumption against retroactivity is designed to protect against in the absence of a clear statement from Congress. *See Landgraf*, 511 U.S. at 270 (presumption against retroactivity "has consistently been explained by reference to the unfairness of imposing new *burdens* on persons after the fact") (emphasis added). Indeed, the cases cited by plaintiffs routinely involved statutes that imposed significant legal burdens after the fact. *See, e.g., St. Cyr*, 533 U.S. at 321-25 (elimination of alien's eligibility for a waiver of deportation had retroactive effect, because alien reasonably relied on the availability of such relief when he agreed to plead guilty); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 510 U.S. 939, 948-50 (1997) (1986 amendment to False Claims Act had retroactive effect when applied to pre-1986 case because it created a new cause of action and thereby imposed new duties and increased liabilities on past conduct); *Landgraf*, 511 U.S. at 281-84 (1991 Civil Rights Act provisions allowing compensatory and punitive damages for Title VII violations could not be

---

[10] Nor do the other foreign affairs cases cited by plaintiffs, *see* Pl. Br. at 16, support such a conflict with U.S. foreign policy. *See, e.g., Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 187-88 (2d Cir. 2003) (remanding to determine State Department's position, which court described as "crucial" to the analysis); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1492-98 (11th Cir. 1986) (giving *effect* to U.S. foreign policy that FSIA should not apply retroactively to China).

applied in pre-1991 case absent clear statement because it attached new legal burdens by directly increasing a party's liability). Such cases are vastly different from the situation here, where no legal duties or obligations have been retroactively imposed on plaintiffs,[11] where plaintiffs had no ability at all to sue Iraq at the time of the underlying conduct, and where, even after the enactment of Section 1605(a)(7), plaintiffs could have no reasonable expectation or right to litigate their claims without interference as required by the Nation's foreign policy.

Plaintiffs erroneously suggest that laws eliminating jurisdiction *automatically* have retroactive effect when applied to pending cases. *See* Pl. Br. at 14-15. In *Hughes Aircraft*, which plaintiffs cite for this proposition, the Court held that a statute which "*creates* a new *cause of action*," even though "phrased in 'jurisdictional' terms," was retroactive in effect because it spoke "not just to the power of a particular court but to the substantive rights of the parties as well." 520 U.S. at 950, 951 (emphasis added). Such a conclusion is a perfectly logical extension of the Court's consistent presumption against the retroactive application of statutes that subject entities to increased burdens or liabilities for pre-enactment conduct. It is far from clear, however, that *Hughes* has any relevance at all to jurisdiction-*ousting* statutes, which typically remove rather than

---

[11] Nor have any new legal consequences attached retroactively with respect to Iraq's conduct. Indeed, Iraq's immunity has simply been restored to the exact state it was in when the acts of hostage taking were committed in 1993 and 1995.

create burdens.[12] *See, e.g., Lindh*, 521 U.S. at 343-44 & n.3 (Rehnquist, J., dissenting) (noting that "nothing in *Hughes* disparaged our longstanding practice of applying *ousting* statutes to pending cases") (emphasis in original). In fact, the D.C. Circuit has specifically held that *Hughes* does not undermine *Hallowell v. Commons*, 239 U.S. 506 (1918), in which the Supreme Court held that jurisdiction-ousting statutes do *not* affect substantive rights (and thus presumptively apply to judgments rendered immediately after their enactment), at least where the underlying claims can be resolved by the Executive Branch. *See LaFontant v. INS*, 135 F.3d 158, 162-65 (D.C. Cir. 1998); *see also* U.S. St. at 22-25 (discussing jurisdiction ousting cases).[13]

---

[12] Indeed, *Hughes supports* the immediate application of a jurisdiction-ousting statute in a case such as this, where jurisdiction was granted only *after* the underlying conduct took place, because such a statute "can fairly be said merely to regulate the secondary conduct of litigation and not the underlying primary conduct of the parties." 520 U.S. at 951.

[13] Plaintiffs cite *Matthews v. Kidder, Peabody & Co.*, 161 F.3d 156 (3d Cir. 1998) and *Scott v. Boos*, 215 F.3d 940 (9th Cir. 2000), *see* Pl. Br. at 15, but unlike Section 1503, the statute at issue in those cases eliminated a cause of action, rather than just jurisdiction, and thus spoke to the substantive rights of the parties in a way that the restoration of Iraq's sovereign immunity does not. Although another case cited by plaintiffs, *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173 (2d Cir. 2003), did apply *Hughes* to a jurisdiction-ousting statute, its analysis is flawed and inconsistent with decisions of the D.C. Circuit. *Abrams*, for example, does not discuss *Hallowell* or any of the numerous other Supreme Court decisions giving immediate effect to jurisdiction-ousting provisions; and, in *LaFontant*, the D.C. Circuit squarely held that those decisions retain vitality after *Hughes*. *See* 135 F.3d at 164-65. *Abrams* also expressly rejected the D.C. Circuit's analysis of FSIA jurisdiction in *Princz v. Federal Republic of*

Plaintiffs concede that a statute does not have retroactive effect when it "takes away jurisdiction from the federal courts and vests *exclusive* authority in an executive agency to resolve certain disputes." Pl. Br. at 17 (quoting *Lafontant*, 135 F.3d at 162) (emphasis added). Plaintiffs also acknowledge that they may seek espousal of their claims by the Executive Branch. *See id.* Indeed, that is the traditional remedy for claims against a foreign state. *See, e.g., Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) ("the rights of our citizens against foreign governments are vindicated only by Presidential intervention"); Note, *Avoiding Expropriation Loss*, 79 Harv. L. Rev. 1666, 1666 (1966) (where foreign sovereign immunity prevents litigation in United States courts, injured parties may seek espousal). Nonetheless, plaintiffs claim that because the form of espousal is unclear at this juncture and, in any event, a matter of Presidential discretion, Section 1503 "effectively eliminate[s] [their] right of redress" for their claims against Iraq. Pl. Br. at 18.

The current uncertainty regarding resolution of plaintiffs' claims, however, is hardly surprising given the unfinished business of Iraqi reconstruction. *See* UNSCR 1483 § 23(b) (preserving claims against Iraq until new "internationally recognized government is established"); *cf. Joo*, 332 F.3d at 684 (World War II claims against Japan settled by treaty in 1951). Moreover, plaintiffs are not altogether denied a forum simply because espousal of their claims is

---

Germany, 26 F.3d 1166, 1175-76 (D.C. Cir. 1994). *See Abrams*, 332 F.3d at 183-84. In any event, *Abrams* is not instructive on the ultimate question of retroactive effect because it did not resolve whether the plaintiffs in that action had an expectation rising to the level of a substantive right to litigate their case.

committed to the President's discretion. Indeed, in both *Hallowell* and *LaFontant*, the litigant was left with nothing more than the opportunity to seek discretionary relief from the Executive Branch. Although, like in those cases, there is no "guarantee" here of relief, Pl. Br. at 17, plaintiffs have the opportunity to present their claims to the Executive Branch. Thus, elimination of a judicial forum does not affect plaintiffs' substantive rights. *See Hallowell*, 239 U.S. at 508; *LaFontant*, 135 F.3d at 162, 165. Furthermore, even if plaintiffs had no forum to pursue their claims, they had no substantive right or reasonable expectation to litigate their claims against Iraq either (1) at the time of their injuries, because Section 1605(a)(7) had not been enacted, or (2) in the face of changing foreign policy after Section 1605(a)(7)'s enactment, for reasons already explained. The restoration of Iraq's immunity, therefore, is plainly not retroactive at all.

2. A Clear Statement Rule Cannot Apply to Frustrate Foreign Policy

A clear statement rule, in any event, is inapplicable here because it is well-settled that such a rule can not operate to frustrate foreign policy determinations of the political branches. *See* U.S. St. at 13-14, 16-17. In the venerable case of *The Schooner Peggy*, the Supreme Court clearly distinguished cases involving foreign policy judgments from cases where the presumption against retroactivity ordinarily applies:

> It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties; but in great national concerns where

> individual rights acquired by war are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

5 U.S. (1 Cranch) 103, 110 (1801).

Despite this explicit authority, plaintiffs argue that *The Schooner Peggy* actually underscores the applicability of a clear statement rule in the foreign policy context, because the treaty at issue in that case expressly provided for the restoration of the French vessel despite a contrary judgment already issued by the lower court. *See* Pl. Br. at 16. It is plain from the opinion, however, that the Court did not believe that the treaty was as clear as plaintiffs suggest. Although the treaty provided for the restoration of vessels "not yet definitively condemned," 5 U.S. at 107, it did not specifically state whether vessels that had been condemned by a judgment of a lower federal court fit within that definition. It was therefore up to the Court to determine whether or not the lower court's judgment constituted a definitive condemnation of the vessel and, accordingly, whether the treaty should be applied on appeal to overturn the judgment. *See id.* at 108-09. In construing the treaty, the Court

believed it necessary—as evidenced by the passage quoted above—to decide whether a clear statement rule was applicable.[14]

In resolving that question, the Court recognized that in "mere private cases" it would ordinarily "struggle hard" against a retroactive construction (as the Court later confirmed in *Landgraf*), but ultimately held that "in great national concerns," it will not require a particularly clear statement before giving immediate effect to a new law reflecting a foreign policy objective. *Id.* at 110. Due to obvious concerns, the Court made readily apparent that it would not allow an over-zealous application of non-retroactivity principles to defeat the "manifest import" of foreign policy determinations. That principle has endured to this day.

Indeed, the principle announced in *The Schooner Peggy* is inherent in our constitutional framework, because the application of a clear statement rule in such cases would conflict with the President's plenary and exclusive authority to act and make independent judgments in the context of foreign affairs. *See* U.S. St. at 17-18. It is undisputed that Article II of the Constitution vests the President with the principal authority and responsibility for conducting the foreign policy of the United States. *See, e.g., American Ins. Ass'n v. Garamendi*, 123 S. Ct. 2374, 2386 (2003) (President has "vast share of responsibility for the conduct of our foreign relations") (internal quotation marks omitted);

---

[14] Notably, the language which plaintiffs argue is required in this case—an explicit statement by Congress that Iraq's sovereign immunity may be restored in pending cases—is far more specific than the language found sufficient by the Supreme Court in *The Schooner Peggy*.

Department of the Navy v. Egan, 484 U.S. 518, 529 (1988) (foreign policy is "the province and responsibility of the executive"); *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948) (President is the "guiding organ in the conduct of our foreign affairs"). Precisely because the President has the "better opportunity" to discern which course of action would best advance the Nation's foreign policy objectives, Congress often empowers the President to act in this area as he sees fit.[15] *Curtiss-Wright*, 299 U.S. at 320; *see also id.* at 324 (Congress may leave the exercise of foreign affairs powers to the President's "unrestricted judgment").

Thus, by broadly and unequivocally authorizing the President to "make inapplicable with respect to Iraq" any law that applies to countries that have supported terrorism, Section 1503 "evinces legislative intent to accord the President broad discretion [and] may be considered to invite measures on independent responsibility." *Dames & Moore*, 453 U.S. at 678 (internal quotation marks omitted). Accordingly, even if there were some ambiguity regarding the application of Section 1503 to pending Section 1605(a)(7) cases, the President's construction of Section 1503 would warrant deference.

Plaintiffs dispute the President's conclusion that Section 1503's broad language and use of the present

---

[15] For example, when Congress delegated to the President the authority to impose or waive sanctions against Burma, the Supreme Court noted that "Congress clearly intended . . . to provide the President with flexible and effective authority over economic sanctions against Burma" and to enable him "to respond to change by suspending sanctions in the interest of national security." *Crosby*, 530 U.S. at 374, 375.

tense "make inapplicable" authorized him to restore Iraq's sovereign immunity from pending Section 1605(a)(7) suits. *See* Pl. Br. at 19-20. But authorizing the President to "make [provisions] inapplicable" is a perfectly natural way to describe an intent to cover the future adjudication of cases and the entry of future judgments, which is what is at issue here. Significantly, the Supreme Court has repeatedly applied similarly broad jurisdiction-ousting statutes to pending cases even absent specific guidance from Congress regarding the intended effect on such cases. *See* U.S. St. at 22-25.

The President's construction is also entirely consistent with the foreign policy determination of the political branches, embodied in Section 1503, that the continued application to Iraq of the various legal sanctions imposed as a result of the rogue conduct of the former regime could unduly impede efforts to reconstruct Iraq and to facilitate the development of a stable, peaceful and democratic Iraqi government. *See* U.S. St. at 10-12. Notably, under plaintiffs' interpretation, the President's Determination would *not* make Section 1605(a)(7) inapplicable to Iraq, as the clear language of Section 1503 authorizes. Rather, Section 1605(a)(7) would remain applicable to Iraq until the statute of limitations ran on claims that arose through the end of the Hussein regime. The new Iraqi government, the success of which is of critical importance to the United States, could then be hobbled for years to come by potentially massive judgments arising from the Hussein dictatorship.

Plaintiffs cite no case in which a court thwarted a foreign policy determination of a President based on the application of a clear statement rule. Indeed,

such a result would be extraordinary, especially where the President has acted, as he has here, pursuant to both congressional authorization and his own constitutional authority. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (President's authority in such cases is "at its maximum"). The President's conclusion that Iraq's immunity has been restored in pending Section 1605(a)(7) cases should therefore be given full and immediate effect by this Court.

III. BECAUSE THE COURT LACKS JURISDICTION, IT NEED NOT CONSIDER WHETHER PLAINTIFFS HAVE ALLEGED A VIABLE CAUSE OF ACTION

As previously stated, *see* U.S. St. at 27-28, plaintiffs have not pled a valid cause of action against Iraq to the extent that their complaint relies solely on Section 1605(a)(7). *See Cicippio-Puleo*, 353 F.3d at 1033. Plaintiffs now claim that their cause of action is grounded in 28 U.S.C. § 1606—a provision nowhere cited in their complaint but which they allege allows them to sue Iraq for intentional infliction of emotion distress under "principles of common law." Pl. Br. at 24. The Court need not reach that question, however, because it lacks subject matter jurisdiction and consequently must dismiss this action. In any event, the United States has recently stated its view regarding the scope of 28 U.S.C. § 1606 in *Kilburn v. Islamic Republic of Iran*, No. 03-7117 (D.C. Cir.) (oral argument scheduled for May 14, 2004). Although it is unnecessary to consider that issue here, the United States' *Kilburn* brief is attached hereto for the Court's information.

CONCLUSION

For the foregoing reasons, and the reasons stated in the United States' Statement of Interest, the Court should dismiss plaintiffs' complaint for lack of subject-matter jurisdiction.

Dated: May 5, 2004

Respectfully submitted,

PETER D. KEISLER
Assistant Attorney General
ROSCOE C. HOWARD, JR.
United States Attorney
SHANNEN W. COFFIN
Deputy Assistant Attorney General
JOSEPH H. HUNT
Director, Federal Programs Branch
VINCENT M. GARVEY
Deputy Director, Federal Programs Branch

/s/ Andrew H. Tannenbaum
ANDREW H. TANNENBAUM (N.Y. Bar)
U.S. Department of Justice, Civil Division
P.O. Box 883
20 Massachusetts Ave., NW
Washington, D.C. 20044
(202) 514-4263 (tel);
(202) 616-8202 (fax)
Counsel for United States of America

APPENDIX N

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT SIMON
34B Ha'kivma Street
Herzylia Pituah, Israel,
FRANÇOISE SIMON
34B Ha'kivma Street
Herzylia Pituah, Israel,
ROBERTO ALVAREZ
2634 SW 4th Avenue
Miami, FL 33129,
ROBERT ALVAREZ
c/o Roberto Alvarez
2634 SW 4th Avenue
Miami, FL 33129
Plaintiffs,

v.

THE REPUBLIC OF IRAQ
c/o Ministry of Foreign Affairs
Baghdad, Republic of Iraq,
THE IRAQI INTELLIGENCE SERVICE c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, and SADDAM HUSSEIN in his personal capacity and official capacity as PRESIDENT OF THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq,
Defendants.

FIRST AMENDED COMPLAINT

FIRST AMENDED COMPLAINT FOR DAMAGES[1]

Plaintiffs, Americans taken hostage and tortured by the Republic of Iraq during the Gulf War, and their principally affected family members, bring this action against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his personal capacity and in his official capacity as president of Iraq during the occurrence of the illegal acts. This action is for the personal injury caused to the Plaintiffs as a result of being seized, held hostage, and tortured while held by Iraq in Kuwait and Iraq, and for the personal injury to their family members caused by these acts against their loved ones. Plaintiffs seek redress for personal injury, emotional distress, economic damages, pain and suffering, and solatium, and punitive damages to prevent further hostage taking and torture of Americans. Plaintiffs, as and for their First Amended Complaint, allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1605-1607 of that title, including particularly 28 U.S.C. § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, *as amended*, ("FSIA"), which provides a general exception from immunity of a foreign state for any case in which money damages are sought for personal injury caused by an act of torture, hostage taking, or the provision of material support or

---

[1] Plaintiffs filed their Complaint in this case on March 18, 2003.

resources for such act by an official, employee, or agent of a state designated as a state sponsor of terrorism at the time the illegal acts occurred. Relevant to this provision, the Republic of Iraq was designated as a state sponsor of terrorism by the Department of State on September 13, 1990, following its invasion of Kuwait, prior to its hostage taking and torture of these Americans by Iraqi military and intelligence officials under the direct guidance and control of Saddam Hussein, during the Persian Gulf War. The Republic of Iraq was so designated throughout the period in which the acts complained of in this First Amended Complaint occurred, and it remains so designated.

2. Further, all claimants in this action are nationals of the United States, and the Defendants in this action have been afforded a reasonable opportunity to arbitrate the claims detailed herein for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration. A copy of correspondence affording Defendants this opportunity is attached hereto at Tab A. A further offer to enter into such arbitration concerning the claims herein for acts occurring in the Republic of Iraq in lieu of prosecution of the claims in this action was filed with the Complaint and is attached hereto at Tab B. In addition, a renewed offer to enter into such arbitration to accompany the service of this First Amended Complaint is attached hereto at Tab C.

3. This action, brought pursuant to 28 U.S.C. §§ 1330 and 1602-11 of the FSIA, is filed within the limitations period for actions under 28 U.S.C. § 1605(a)(7), as set out in § 1605(f). The Government of the Republic of Iraq, the Iraqi Intelligence Service,

and Saddam Hussein, in his personal capacity and in his official capacity as President of the Republic of Iraq during the occurrence of the illegal acts, were immune from suit in this action prior to the 1996 Amendments to the FSIA by the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1241 (1996), which added § 1605(a)(7) to the FSIA. That provision tolled the limitations period until effective enactment of these amendments on April 24, 1996, and the ten-year limitation period begins in that month and year and runs until April 2006. Further, the 1996 Amendments adding § 1605(a)(7) were specifically made retroactively applicable by Congress to "any cause of action arising before, on, or after the date of the enactment of this Act." *See* P.L. 104-132, § 221(c), 110 Stat. 1243 (April 24, 1996), *reprinted at* 28 U.S.C.A. § 1605 note.

4. Venue is properly in this district pursuant to 28 U.S.C. § 1391(f)(4) because Defendants are "foreign states" as defined by 28 U.S.C. § 1603(a) & (b). Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603(a). Defendants the Iraqi Intelligence Service and Saddam Hussein, in his official capacity as President of the Republic of Iraq, are "agencies or instrumentalities of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, are also "foreign states" within the meaning of 28 U.S.C. § 1603(a).

5. Plaintiffs acknowledge that the U.S. Court of Appeals for the D.C. Circuit held in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), that 28 U.S.C. § 1605(a)(7) and 28 U.S.C. § 1605 note (the "Flatow Amendment" to the FSIA) do not, by their terms, create a cause of action against a

foreign state. Nothing in *Cicippio-Puleo*, however, insulates a terrorist state from being held liable under 28 U.S.C. § 1606, and that case in fact explicitly left open the possibility that causes of action from "some other source of law, including state law," could be pleaded against terrorist states. *Cicippio-Puleo*, 353 F.3d at 1036. As the forum jurisdiction, the District of Columbia provides that source of law. While 28 U.S.C. § 1605(a)(7) strips immunity from the Defendants for their horrific acts against the Plaintiffs, 28 U.S.C. § 1606 provides a vehicle for causes of action against the Defendants for those acts. That section provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. § 1606. In providing that a "foreign state shall be liable," section 1606 unquestionably creates a cause of action against foreign states. Had the acts of assault, battery, false imprisonment, and intentional infliction of emotional distress upon which Plaintiffs' claims are based been committed by a private individual, he would plainly be subject to liability for those acts. Accordingly, *Cicippio-Puleo* does not preclude seeking to hold perpetrators of torture and hostage taking against American citizens liable, as Congress plainly intended, in this way.

6. Further, although the Flatow Amendment does not create a cause of action running directly against the foreign state, *Cicippio-Puleo* affirmed that the Flatow Amendment does "create a cause of action against officials, employees, and agents" of foreign states "in their personal capacities." 353 F.3d at 1029. Thus, the Flatow Amendment imposes liability

upon any private individual who, while acting as an "agent" of a foreign state, engages in acts of hostage taking and torture (or any other terrorist acts specified in § 1605(a)(7) of the FSIA) that result in personal injury or death to a U.S. national. 28 U.S.C. § 1605 note. By operation of the plain language of § 1606, a terrorist state that engages in such acts is likewise subject to liability.

* * * * *

PLAINTIFFS

15. Plaintiff Robert Simon is a United States citizen, who resides in Herzylia Pituah, Israel. He was taken hostage by Iraq on January 21, 1991, and continued to be held hostage by Iraq until his release on March 2, 1991.

16. Plaintiff Françoise Simon is a United States citizen, who resides in Herzylia Pituah, Israel. She is the spouse of Robert Simon, and was his spouse throughout his period of captivity.

17. Plaintiff Roberto Alvarez is a United States citizen, and a resident of the State of Florida. He was taken hostage by Iraq on January 21, 1991, and continued to be held hostage by Iraq until his release on March 2, 1991.

18. Plaintiff Robert Alvarez is a United States citizen, and a resident of the State of Florida. He is the adult son of Roberto Alvarez.

DEFENDANTS

19. Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603, whose activities of torture and resulting tortious personal injury of American hostages and their families as set forth in this First Amended Complaint are within the exceptions to jurisdictional immunity of a foreign

state pursuant to the FSIA. Its officials, employees, and agents carried out the torture and related mistreatment of the American hostages under the direction of Saddam Hussein while acting within the scope of their office, employment, or agency. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the hostage taking, torture, and related harm to the American hostages and their family members.

20. Defendant the Iraqi Intelligence Service is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. The Service and its officials and employees are officials, employees, or agents of the Republic of Iraq who participated in and provided material support and resources to the acts of hostage taking, torture, and related harm to the American hostages and their family members.'

21. Defendant Saddam Hussein, former President of Iraq, was an "official" of Iraq within the meaning of § 1605(a)(7) during the occurrence of the illegal acts. Similarly, for purposes of § 1605(a)(7), he was also an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, was a "foreign state" within the meaning of § 1603. Saddam Hussein was at the time of the relevant events the President, and dictator, of a single-party totalitarian state and is simultaneously the Head of the State, the Chair of the Governing Council, the Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other

agencies and instrumentalities of Iraq. As President of Iraq during the relevant time period of hostage taking, torture and related harm to the American hostages and their family members, Defendant Saddam Hussein was responsible for these injuries while acting within the scope of his office. In that office, he had both direct command responsibility for the torture and related mistreatment of American hostages taken in Kuwait and Iraq, and responsibility for provision of material support to such acts by Iraqi forces. Further, all of the assets of Iraq were ultimately subject to his direction and control. Additionally, he is sued here in his personal capacity.

STATEMENT OF FACTS

22. On January 16, 1991, an international coalition force of thirty-three nations led by the United States commenced active hostilities against Iraq to enforce the U.N. Security Council mandate to withdraw from Kuwait. On February 24, 1991, following expiration of a coalition deadline for Iraq unconditionally to withdraw its forces from Kuwait, the coalition forces began a ground campaign to force compliance with Iraq.

23. On January 21, 1991, while filming the border between Saudi Arabia and Kuwait for a news story on the unrest in the Middle East, Robert Simon, a CBS correspondent, and Roberto Alvarez, a free-lance cameraman working for CBS, along with two of their companions, were taken hostage by Iraqi soldiers in the "no man's land" between the border of Saudi Arabia and Kuwait.

* * * * *

RELIEF REQUESTED

63. **WHEREFORE**, Plaintiffs, as determined by their individual facts as specified herein, and in recognition of the depraved and outrageous conduct of the Defendants, respectfully request the following relief to be entered against all Defendants, The Republic of Iraq, the Iraqi Intelligence Service, and former President Saddam Hussein, in his official capacity and personal capacity, jointly and severally:

(a) General and specific compensatory damages (including paint and suffering) in excess of Fifteen Million Dollars ($15,000,000.00) as to each Plaintiff Robert Simon and Roberto Alvarez;

(b) General and specific compensatory damages (including solatium) in excess of Three Million Dollars ($3,000,000.00) as to each Plaintiff Françoise Simon and Robert Alvarez;

(c) Costs of this suit;

(d) Reasonable attorneys' fees; and

(e) Such further relief as the Court may deem just and proper.

64. **PLAINTIFFS FURTHER RESPECTFULLY REQUEST** the following additional relief to be entered against Defendants, the Iraqi Intelligence Service, and President Saddam Hussein in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) Punitive damages in excess of One Hundred Million Dollars ($100,000,000.00), to be shared equally between all Plaintiffs; and

(b) Such further relief as the Court may deem just and proper.

Respectfully submitted,
Stephen A. Fennell
D.C. Bar # 290379
1330 Connecticut Avenue N.W.
Washington, D.C. 20046-1795
(202) 429-8082
(202) 429-3902 - fax
Attorney for the Plaintiffs

Dated September 13, 2004

APPENDIX O

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NABIL SEYAM
9405 East Lakepoint
Wichita, KS 67226,
AHMAD SEYAM
9405 East Lakepoint
Wichita, KS 67226,
YUSEF SEYAM
9405 East Lakepoint
Wichita, KS 67226,
MELISSA SEYAM
2357 N. Rutland Court
Wichita, KS 67226,
CARRIE SEYAM
7650 East 32nd Street North, Apt. 307 Wichita, KS 67226, Plaintiffs,
v.
THE REPUBLIC OF IRAQ c/o. Ministry of Foreign Affairs Baghdad, Republic of Iraq, THE IRAQI INTELLIGENCE SERVICE c/o Ministry of Foreign Affairs Baghdad, Republic of Iraq, and SADDAM HUSSEIN in his personal capacity and his official capacity as PRESIDENT OF THE REPUBLIC OF IRAQ c/o Ministry of Foreign Affairs, Baghdad, Iraq,
Defendants.

No. 1:03CV00888 (RBW)

SECOND AMENDED COMPLAINT

SECOND AMENDED COMPLAINT FOR DAMAGES

Nabil Seyam, an American taken hostage by the Republic of Iraq just before the first Gulf War, and certain immediate family members bring this action against the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his personal capacity and in his official capacity as President of Iraq during the occurrence of the illegal acts. This action is for the personal injury caused to the Plaintiffs as a result of being seized, held hostage and tortured while held by Iraq in Kuwait and Iraq, and for the personal injury to Seyam's family members caused by these acts. Plaintiffs seek redress for personal injury, emotional distress, economic damages, pain and suffering, loss of consortium, and solatium, and punitive damages to prevent future hostage taking and torture of Americans. Plaintiffs allege as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over all matters in this action with respect to 28 U.S.C. § 1330 as a claim for relief with respect to a foreign state not entitled to immunity under §§ 1605-1607 of that title, including particularly 28 U.S.C. § 1605(a)(7) of the Foreign Sovereign Immunities Act of 1976, as amended, ("FSIA"). Section 1605(a)(7) provides a general exception from immunity of a foreign state for any case in which money damages are sought for personal injury caused by an act of torture, hostage taking, or the provision of material support or resources for such acts by an official, employee, or agent of a state designated as a state sponsor of terrorism at the time the illegal acts occurred. Relevant to this provision, the Republic of Iraq was

designated as a state sponsor of terrorism by the Department of State on September 13, 1990, following its invasion of Kuwait, prior to its hostage taking and torture of Seyam by Iraqi military and intelligence officials under the direct guidance and control of Saddam Hussein. The Republic of Iraq was so designated throughout the period in which the acts complained of in this Second Amended Complaint occurred and it remains so designated.

2. Further, all claimants in this action are nationals of the United States, and the Defendants in this action have been afforded a reasonable opportunity to arbitrate the claims detailed herein for acts occurring in the Republic of Iraq in accordance with accepted international rules of arbitration. A copy of correspondence affording Defendants this opportunity is attached hereto at Tab A. A further offer to enter into such arbitration concerning the claims herein for acts occurring in the Republic of Iraq in lieu of prosecution of the claims in this action has been filed with this Second Amended Complaint and is attached hereto at Tab B. In addition, a renewed offer to enter into such arbitration to accompany the service of this Second Amended Complaint is attached hereto at Tab C.

3. Plaintiffs acknowledge that the U.S. Court of Appeals for the D.C. Circuit held in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), that 28 U.S.C. §1605(a)(7) and 28 U.S.C. § 1605 note (the "Flatow .Amendment" to the FSIA) do not, by their terms, create a cause of action against a foreign state. Nothing in *Cicippio-Puleo*, however, insulates a terrorist state from being held liable under 28 U.S.C. § 1606, and that case in fact explicitly left open the possibility that causes of

action from "some other source of law, including state law," could be pleaded against terrorist states. *Cicippio-Puleo*, 353 F.3d at 1036. As the forum jurisdiction, the District of Columbia provides that source of law. At bottom, §1605(a)(7) is the means to waiving a foreign state's sovereign immunity and the statute by which jurisdiction attaches. The provision then allows a claim to be brought based on tort causes of action by virtue of § 1606. *Cicippio-Puleo* does not preclude seeking to hold perpetrators of torture and hostage taking against American citizens liable, as Congress plainly intended, in this way.

4. While 28 U.S.C. § 1605(a)(7) strips immunity from the Defendants for their horrific acts against the Plaintiffs, 28 U.S.C. § 1606 provides a vehicle for causes of action against the Defendants for those acts. That section provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity. . ., the foreign state shall be liable in the same manner and to the same extent as a private individual in like circumstances." 28 U.S.C. § 1606. In providing that a "foreign state shall be liable," section 1606 unquestionably creates a cause of action against foreign states. Had the acts of assault, battery, false imprisonment, and intentional infliction of emotional distress upon which Plaintiffs' claims are based been committed by a private individual, he would plainly be subject to liability for those acts. Accordingly, the *Cicippio-Puleo* decision provides no basis for dismissing Plaintiffs' outstanding claims.

5. Further, although the Flatow Amendment does not create a cause of action running directly against the foreign state, *Cicippio-Puleo* affirmed that the Flatow Amendment does "create a cause of action

against officials, employees, and agents" of foreign states "in their personal capacities." 353 F.3d at 1029. Thus, the Flatow Amendment imposes liability upon any private individual who, while acting as an "agent" of a foreign state, engages in acts of hostage taking and torture (or any other terrorist acts specified in section 1605(a)(7) of the FSIA) that result in personal injury or death to a U.S. national. 28 U.S.C. § 1605 note. By operation of the plain language of § 1606, a terrorist state that engages in such acts is likewise subject to liability.

6. This action, brought pursuant to 28 U.S.C. §§ 1330 & 1602-11 of the FSIA, is filed within the limitations period for actions under 28 U.S.C. § 1605(a)(7), as set out in § 1605(f). The Government of the Republic of Iraq, the Iraqi Intelligence Service, and Saddam Hussein, in his personal capacity and in his official capacity as President of the Republic of Iraq during the occurrence of the illegal acts, were immune from suit in this action prior to the 1996 Amendments to the FSIA by the Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214, 1241 (1996), which added § 1605(a)(7) to the FSIA. That provision tolled the limitations period until effective enactment of these amendments on April 24, 1996, and the ten-year limitations period begins in that month and year and runs until April 2006. Further, the 1996 Amendments adding § 1605(a)(7) were specifically made retroactively applicable by Congress to "any cause of action arising before, on, or after the date of the enactment of this Act." *See* P.L. 104-132, § 221 (c), 110 Stat. 1243 (April 24, 1996), *reprinted at* 28 U.S.C.A. § 1605 note.

7. Venue is properly in this district pursuant to 28 U.S.C. § 1391(f)(4) because Defendants are "foreign states" as defined by 28 U.S.C. § 1603(a) and (b). Defendant Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603(a). Defendants the Iraqi Intelligence Service and Saddam Hussein, in his official capacity as President of the Republic of Iraq, are or were "agencies or instrumentalities of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, are also "foreign states" within the meaning of 28 U.S.C. § 1603(a).

* * * * *

PLAINTIFFS

15. Plaintiff Nabil Seyam is a United States citizen, who resides in Wichita, Kansas. He was taken hostage by Iraq on October 1, 1990, and continued to be held hostage by Iraq until his release on October 19, 1990.

16. Plaintiff Melissa Seyam is a United States citizen, and a resident of the State of Kansas. She is the daughter of Nabil Seyam.

17. Plaintiff Ahmad Seyam is a United States citizen, and a resident of the State of Kansas . He is the son of Nabil Seyam.

18. Plaintiff Yusef Seyam is a United States citizen, and a resident of the State of Kansas. He is the son of Nabil Seyam.

19. Plaintiff Carrie Seyam is a United States citizen, and a resident of the State of Kansas. She is the former spouse of Nabil Seyam.

DEFENDANTS

20. Defendant the Republic of Iraq is a "foreign state" as defined by 28 U.S.C. § 1603, whose

activities of torture and resulting tortious personal injury of American hostages and their families as set forth in this Second Amended Complaint are within the exceptions to jurisdictional immunity of a foreign state pursuant to the FSIA. Its officials, employees, and agents carried out the torture and related mistreatment of Nabil Seyam under the direction of Saddam Hussein while acting within the scope of their office, employment, or agency. Irrespective of individual and institutional responsibilities that also exist, the Republic of Iraq is responsible for the hostage taking, torture, false imprisonment, assault, battery and emotional. distress intentionally inflicted on Seyam and his family members.

21. Defendant the Iraqi Intelligence Service is an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, is a "foreign state" within the meaning of § 1603. The Service and its officials and employees are officials, employees, or agents of the Republic of Iraq who participated in and provided material support and resources to the acts of hostage taking, torture, false imprisonment, assault, battery and emotional distress intentionally inflicted on Seyam and his family members.

22. Defendant Saddam Hussein, former President of Iraq, was an "official" of Iraq within the meaning of § 1605(a)(7) during the occurrence of the illegal acts. Similarly, for purposes of § 1605(a)(7), he was also an "agency or instrumentality of a foreign state" as defined by 28 U.S.C. § 1603(b) and, as such, was a "foreign state" within the meaning of § 1603. Saddam Hussein was at the time of the relevant events the President, and dictator, of a single-party totalitarian state and was simultaneously the Head

of the State, the Chair of the Governing Council, the Chairman of the Party, the exclusive appointing authority for all government offices, the director of the budget, the Commander-in-Chief of the Military, and at least the de facto head of the Intelligence Service and all other agencies and instrumentalities of Iraq. As President of Iraq during the relevant time period of hostage taking, torture, false imprisonment, assault, battery and emotional distress intentionally inflicted on Seyam and his family members, Defendant Saddam Hussein is responsible for these injuries while acting within the scope of his office. He is sued in his personal capacity and in his official capacity as President of Iraq. In that office, he had both direct command responsibility for the torture and related mistreatment of American hostages taken in Kuwait and Iraq, and responsibility for provision of material support to such acts by Iraqi forces.

STATEMENT OF FACTS

23. On August 2, 1990, the Republic of Iraq invaded and occupied its neighbor Kuwait. On October 1, 1990, Nabil Seyam, a safety engineer for the Kuwait Metal Pipe Industries Company, who had been hiding from Iraqi forces for two months, was kidnapped and taken hostage by Iraqi soldiers manning a checkpoint in Kuwait.

* * * * *

RELIEF REQUESTED

63. **WHEREFORE**, Plaintiffs, as determined by their individual facts as specified herein, and in recognition of the depraved and outrageous conduct of Defendants, respectfully request the following relief to be entered against all Defendants, the Republic of

Iraq, the Iraqi Intelligence Service, and President Saddam Hussein, in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) General and specific compensatory damages (including pain and suffering) in excess of Three Million Dollars ($3,000,000.00 as to Plaintiff Nabil Seyam;

(b) General and specific compensatory damages (including solatium) in excess of One Million Dollars ($1,000,000.00) as to each Plaintiff, Ahmad Seyam, Melissa Seyam, Yusef Seyam, and Carrie Seyam;

(c) Costs of this suit;

(d) Reasonable attorneys' fees; and

(e) Such further relief as the Court may deem just and proper.

56. **PLAINTIFFS FURTHER RESPECTFULLY REQUEST** the following additional relief to be entered against Defendants, the Iraqi Intelligence Service, and President Saddam Hussein in his official capacity as President of the Republic of Iraq, jointly and severally:

(a) Punitive damages in excess of One Hundred Million Dollars ($100,000,000.00), to be shared equally between all Plaintiffs; and

(b) Such further relief as the Court may deem just and proper.

Dated: October 6, 2004

Respectfully submitted,

Stephen A. Fennell (290379)
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
(202) 429-3000 -phone
(202) 429-3902- fax

Attorneys for the Plaintiffs

APPENDIX P

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JORDAN BEATY, AUSTIN MAKENZIE BEATY, a minor by her next friend ROBIN BEATY, BRYAN C. BARLOON and REBECCA L. BARLOON Plaintiffs v. REPUBLIC OF IRAQ Defendant.	Civil Action No.: 1:03CV00215 (JDB)

THIRD AMENDED COMPLAINT

Plaintiffs, by and through their undersigned counsel, bring this action for intentional infliction of emotional distress arising under State common law, for violations of customary international law, and for loss of solatium, stemming from hostage-taking and resulting captivity of their respective fathers, Kenneth Beaty and William Barloon, by Defendant Republic of Iraq. Plaintiffs seek judgment against Defendant Republic of Iraq, and in support of their Third Amended Complaint, aver as follows:

JURISDICTION AND VENUE

1. Jurisdiction over the subject matter of this case arises from 28 U.S.C. § 1330(a). Defendant Republic of Iraq is subject to suit in the courts of the United States pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(7), as amended.

2. Plaintiffs have previously offered to arbitrate according to international rules of arbitration pursuant to 28 U.S.C. § 1605(a)(7). A copy of such Offer to Arbitrate is attached hereto.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(f)(4).

THE PARTIES

4. Plaintiffs Jordan Beaty and Austin Makenzie Beaty, citizens of the United States, are the daughters of Kenneth Beaty and Robin Beaty, Plaintiffs in *Daliberti v. Republic of Iraq* (Case No. 96 CV01118), 146 F. Supp. 2d 19 (D.D.C. 2001) (hereinafter, the "*Daliberti* Case"). Plaintiffs Jordan Beaty and Austin Makenzie Beaty are residents of the State of Oklahoma.

5. Plaintiffs William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are the children of William Barloon and Linda Barloon, plaintiffs in the *Daliberti* Case. Plaintiff William R. Barloon, Bryan C. Barloon and Rebecca L. Barloon are residents of the State of Florida.

6. Defendant Republic of Iraq is a foreign state that between 1990, and March 2003, had been designated a state sponsor of terrorism, pursuant to section 6(j) of the Export Administration Act of 1979, 50 U.S.C. § 2405(j). The Acting Iraqi Ambassador to Washington,

D.C. is Rend al-Rahim. The Iraqi Embassy is located at 1801 P. Street, N.W., Washington, D.C., 20036. Service may be effected upon Defendant Republic of Iraq pursuant to 28 U.S.C. § 1608.

FACTS OF THE CASE

7. Following the conclusion of hostilities between the United States and Defendant Republic of Iraq in 1991, Kenneth Beaty and William Barloon each resided in Kuwait on a temporary basis. Mr. Beaty worked as an oil rig drilling supervisor. Mr. Barloon supervised aircraft maintenance and overhaul.

8. On or about April 25, 1993, Mr. Beaty was traveling within the borders of Kuwait en route to an oil rig located within sight of the Kuwait-Iraqi border.

9. Mr. Beaty stopped at an Iraqi border checkpoint and displayed his credentials to the Iraqi border guards. Mr. Beaty explained to the border guards that he wished only to travel to the oil rig using appropriate roads within the borders of Kuwait. The border guards--all of whom were agents of the Defendant Republic of Iraq and were acting within the scope of their office, employment or agency—arrested Mr. Beaty.

10. The border guards then blindfolded Mr. Beaty and transported him at gunpoint, first to Basra, Iraq, and later to Baghdad. Once in Baghdad, Mr. Beaty was held as a hostage for ransom and was confined to a prison cell for 205 days.

* * * * *

14. On or about March 13, 1995, William Barloon was traveling near the Kuwait-Iraqi border when he encountered an Iraqi border guard.

15. The border guard, an agent of Defendant Republic of Iraq, checked Mr. Barloon's identification, which demonstrated that he was a citizen of the United States. The border guard, acting within the scope of his office, employment or agency, took William Barloon into custody.

16. Initially, Mr. Barloon was transported at gunpoint to Basra, Iraq, and later to Baghdad, where he was held captive at Abu Ghreib prison.

17. During his 126 days in captivity, Mr. Barloon was beaten, subjected to mock executions and deprived of adequate, food, water, medical care and access to toilet facilities. Mr. Barloon lost a significant amount of weight and became hopeless and despondent.

* * * * *

23. Throughout their ordeal, Plaintiffs were acutely aware of the circumstances surrounding their fathers' hostage-taking and mistreatment. Plaintiffs knew their fathers were being held captive by Defendant Republic of Iraq without any legal justification. Through various media sources, Plaintiffs were able to see where their fathers were being held. Through these and other sources, Plaintiffs contemporaneously learned and understood that their fathers were deprived of adequate food, water and medical care had lost substantial weight and were emotionally distraught.

24. Because of their fathers' captivity, Plaintiffs were totally dependent upon their mothers for financial and emotional support. However, Plaintiffs'

mothers were not in a position to provide such support because they suffered extreme emotional distress as a result of their husbands' ordeal. Mrs. Beaty and Mrs. Barloon devoted themselves to various efforts to secure their husbands' release. Such efforts often took them away from their children, both physically and emotionally, for extended periods.

* * * * *

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs demand judgment that be entered against Defendant Republic of Iraq in the following amounts:

a. Compensatory damages in excess of $566,000.00 to Jordan Beaty;

b. Compensatory damages in excess of $566,000.00 to Robin Beaty, as next friend Austin Makenzie Beaty;

c. Compensatory damages in excess of $348,000.00 to William R. Barloon;

d. Compensatory damages in excess of $348,000.00 to Bryan C. Barloon;

e. Compensatory damages in excess of $348,000.00 to Rebecca L. Barloon;

f. Reasonable costs and expenses; and

g. Such other and further relief which the Court may determine to be just and equitable under the circumstances.

Dated: May 20, 2005

Respectfully submitted,

Nelson M. Jones, III
D.C. Bar # 320266
475 Lyric Office Centre
440 Louisiana
Houston, Texas 77002
Tel: (713) 224-5323
Fax: (713) 224-8525

Andrew C. Hall
Florida Bar # 111480
Penthouse, 1428 Brickell Avenue
Miami, Florida 33131
Tel: (305) 374-5030
Fax: (305) 374-5033

James Cooper-Hill
Texas Bar # 04789300
P.O. Box 1867
Rockport, Texas 78381
Tel: (361) 729-3566
Fax: (361) 729-7120

Counsel for Plaintiffs

APPENDIX Q

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT SIMON, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ, et al.,** **Defendants.**	**Civil Action 03-0069 (HHK)**

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 7th day of September 2006, hereby

ORDERED and **ADJUDGED** that the complaint in this case is **DISMISSED**; and it is further

ORDERED that, pursuant to Fed. R. Civ. P 54(b), his judgment is a final judgment, there being no just reason for delay.

Henry H. Kennedy, Jr.
United States District Judge

APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NABIL SEYAM, et al. **Plaintiffs,** **v.** **REPUBLIC OF IRAQ, et al.** **Defendants**	**Civil Action 03-00888 (HHK)**

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, and for the reasons stated by the court in its memorandum opinion docketed this same day, it is this 7th day of September 2006, hereby

ORDERED and **ADJUDGED** that the complaint in this case is **DISMISSED**; and it is further

ORDERED that, pursuant to Fed. R. Civ. P 54(b), this judgment is a final judgment, there being no just reason for delay.

Henry H. Kennedy, Jr.
United States District Judge

APPENDIX S

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES S. VINE, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ,** **Defendant.**	**Civil Action 01-02674 (HHK)**
ROBERT SIMON, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ, et al.,** **Defendants.**	**Civil Action 03-00691 (HHK)**
NABIL SEYAM, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ, et al.,** **Defendants.**	**Civil Action 03-00888 (HHK)**

MEMORANDUM OPINION AND ORDER

These three consolidated actions all challenge the conduct of the Republic of Iraq ("Iraq") during the period prior to the first Gulf War in 1990. Plaintiffs in all three cases allege that, during the course of its invasion of the State of Kuwait, Iraq unlawfully took

plaintiffs hostage and, in some cases, tortured them. Before the court are defendants'[1] motions to dismiss, filed in these cases prior to consolidation. Upon consideration of defendants' motions, the oppositions thereto, and the record of the case, the court concludes that defendants' motions should be granted in Civil Actions 03-000691 and 03-00888 and granted in part and denied in part in Civil Action 01-02674.

I. BACKGROUND

The facts underlying this consolidated action as alleged by plaintiffs are as follows. On August 2, 1990, Iraqi armed forces invaded Kuwait, seizing control of the country. Immediately thereafter, Saddam Hussein, then-President of Iraq, issued a directive prohibiting all foreign nationals, including more than 2,000 American citizens, from leaving Iraq and Kuwait. In both countries, American citizens were denied access to their passports, refused exit visas, and physically prevented from leaving the cities of Baghdad and Kuwait City by the use of roadblocks. Approximately two weeks later, Hussein ordered all American citizens to report to hotels in those two cities. Those who obeyed his order, as well as others captured by Iraqi authorities, were forcibly relocated to strategic sites in Iraq where they served as "human shields" to prevent an attack by the allied forces. Additionally, a large number of Americans sought safe haven from Iraqi military forces by seeking refuge in either diplomatic

---

[1] In addition to Iraq, Saddam Hussein, then-President of Iraq, and the Iraqi Intelligence Service are named as defendants in Civil Actions 03-000691 and 03-00888. Collectively, the defendants will be referred to as "Iraq."

properties or in private residences and "safehouses" throughout Kuwait and Iraq.

On August 19, 1990, President George H.W. Bush declared that all United States citizens in Kuwait and Iraq, regardless of whether they were in the physical custody of Iraqi forces, were "hostages" because they were being used by Hussein as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait. President Bush demanded that Hussein release all American citizens and warned that the Iraqi government would be responsible for their safety and well-being.

By the end of August, Hussein authorized the release of all American women and children and several American male hostages with serious medical conditions. At the same time, Hussein promised to release the remaining hostages in exchange for a promise from the United States not to attack Iraq. The United States refused to accede to Hussein's demands and repeated its call for the release of all American citizens in Kuwait and Iraq.

On September 1, 1990, as a result of the illegal seizure and detention of American citizens in Kuwait and Iraq, the U.S. Department of State designated Iraq a "terrorist state" under 50 U.S.C. § 2405(j).

Between September 1, 1990, and December 1990, Hussein intermittently permitted the release of small groups of the remaining male hostages for medical and "humanitarian" purposes. The hostage situation ultimately came to an end in the second week of December 1990 when Hussein ordered the release of the last group of approximately 250 American hostages.

During their captivity, the American hostages were subject to conditions of confinement that were "harsh, cruel, degrading, and often terrorizing." *Vine* Third Am. Compl. (Civ. No. 01-2674) ("*Vine* TAC") ¶ 4. These hostages "lived in constant fear for their lives and suffered from fatigue, depression, severe anxiety and stress, and the loss of the companionship of their loved ones." *Id.*

In 1999, a class action was filed on behalf of hundreds of the American citizens, and their spouses, who were held hostage by Iraq. *Hill v. Republic of Iraq*, Civ. No. 99-3346 (D.D.C.) (Jackson, J.). Iraq failed to appear in this action, and the case proceeded by default before Judge Jackson. On June 29, 2001, Judge Jackson denied the *Hill* plaintiffs' motion for class certification. Subsequently, on December 5, 2001, Judge Jackson imposed a moratorium on the addition of new plaintiffs and assertedly informed plaintiffs' counsel that any other former hostages who wished to bring claims against Iraq would have to file a separate suit.

Three weeks later, having been precluded from participating in the *Hill* litigation, plaintiffs in one of the consolidated cases in this matter, *Vine, et al. v. Republic of Iraq*, Civ. No. 01-2674 (D.D.C.), filed their complaint.[2] The third amended complaint in *Vine*, which includes class action allegations, names 236 plaintiffs, all of whom were either taken hostage

---

[2] Plaintiffs' original complaint was filed on December 27, 2001, by Vine and thirty-four others. Three times thereafter, plaintiffs amended their complaint adding a total of 201 more individuals as plaintiffs.

by Iraq in 1990 and/or were spouses of individuals who were taken hostage.[3]

In 2003, two more related cases were filed in this jurisdiction. The first, *Simon, et al. v. Republic of Iraq, et al.*, Civ. No. 03-691 (D.D.C.), involves allegations that two individuals—Robert Simon, a CBS News reporter, and Roberto Alvarez, a cameraman working for CBS News—were illegally seized and subsequently tortured by Iraqi officials in 1991. The second, *Seyam, et al. v. Republic of Iraq, et al.*, Civ. No. 03-888 (D.D.C.), involves similar allegations by plaintiff Nabil Seyam. The three suits were consolidated in May 2005.

II. ANALYSIS

A. Statutory Framework of the Foreign Sovereign Immunities Act

As a general rule, the Foreign Sovereign Immunities Act ("FSIA"), enacted in 1976, establishes that foreign states (including "a political subdivision of a foreign state or an agency or instrumentality of a foreign state," 28 U.S.C. § 1603(a)), are immune from suit in courts in the United States. 28 U.S.C. § 1604.[4] A limited number

[3] Two hundred of these plaintiffs were physically present in Iraq or Kuwait on August 2, 1990. Seventy were married to an American hostage who was physically present in Iraq or Kuwait on August 2, 1990. Of these seventy spouses, thirty-four were themselves in Iraq during 1990 but were released prior to their spouses.

[4] Section 1604 of FSIA, 28 U.S.C. § 1604, states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.

of exceptions to this general rule of immunity are enumerated. *Id.* § 1605. The most recent of the exceptions, and the one implicated in this case, provides that a foreign state "shall not be immune from the jurisdiction of courts of the United States or of the States in any case" where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." *Id.* § 1605(a)(7).

In order for this so-called "state-sponsored terrorism exception" to apply, three criteria must be satisfied: (1) the foreign state must be designated as a state sponsor of terrorism at the time of the terrorist act or as a result of the terrorist act; (2) the foreign state must be afforded a reasonable opportunity to arbitrate the claim if the act occurred within the foreign state against which the claim has been brought; and (3) either the claimant or the victim must have been a national of the United States at the time of the terrorist act. *Id.* § 1605(a)(7)(A),(B); *see also Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1028-29 (D.C. Cir. 2004).

Section 1605(a)(7) of FSIA is "merely a jurisdiction-conferring provision that does not otherwise provide a cause of action against either a foreign state or its agents." *Cicippio-Puleo*, 353 F.3d at 1032. To determine what causes of action, if any, may be pressed against a non immune foreign state, FSIA directs courts to pre-existing causes of action. Specifically, § 1606 of FSIA provides, in relevant part:

> As to any claim for relief with respect to which a foreign state is not entitled to immunity . . . , the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances.

28 U.S.C. § 1606. Based on this language, "a plaintiff should be able to bring a cause of action under state or common law, federal statutes (where Congress has not indicated otherwise), and even possibly the law of a foreign country in a Section 1605(a)(7) case, as long as the plaintiff would be able to bring such a claim against an individual in similar circumstances." *Holland v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 40254, at *35-36 (D.D.C. Oct. 31, 2005).

B. Subject Matter Jurisdiction

Iraq argues that the court lacks subject matter jurisdiction over the claims of at least 170 of the plaintiffs in the *Vine* litigation, contending that the state-sponsored terrorism exception does not apply to the claims of those plaintiffs because they were not taken "hostage" as FSIA defines that term. Iraq correctly states that the state-sponsored terrorism exception embodied in 28 U.S.C. § 1605(a)(7) "does not abrogate the sovereign immunity of nations the Department of State has designated state sponsors of terrorism for any and all purposes." Def.'s Mot. (Civ. No. 01-2674) at 4. Rather, § 1605(a)(7) only waives the immunity of such states with respect to claims "for personal injury or death that was caused by an act or torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act." 28 U.S.C. § 1605(a)(7).

The *Vine* plaintiffs do not allege that their claims arise from acts of "torture," "extrajudicial killing," or "aircraft sabotage." Rather, their claims all arise from the "hostage taking" that occurred when Saddam Hussein's regime assertedly detained them at the outbreak of hostilities between Kuwait and Iraq in 1990. Hostage taking is defined in § 1605(e) of FSIA to have "the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages." 28 U.S.C. § 1605(e)(2). Article 1 of the International Convention Against the Taking of Hostages, in turn, states:

> Any person who seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages.

U.N. GAOR, Supp. No. 39, U.N. Doc. A/34/39 (1979). Iraq insists that at least 170 of the *Vine* plaintiffs—those who were not physically held by Iraqi forces but rather received sanctuary at various diplomatic premises or found haven in private safehouses after the invasion of Kuwait—were not "seized" or "detained" by Iraq and that, even assuming they were, the purpose of such "detention" was not to compel a third party to do or refrain from doing something. Accordingly, Iraq insists that FSIA does not waive its immunity with respect to the claims of these plaintiffs and their claims must be dismissed. The court disagrees.

As the Fifth Circuit has held, "a hostage is 'seized' or 'detained' . . . when she is held or confined against her will for an appreciable period of time." *United States v. Carrion-Caliz*, 944 F.2d 220, 225 (5th Cir. 1991).[5] In an analogous criminal case, the Second Circuit clarified that the government "need not show that the defendant actually used physical force or violence to restrain that person" in order to prove that a hostage was held against her will. *United States v. SiLu Tian*, 339 F.3d 143, 153 (2d Cir. 2003). Rather, all that is necessary is evidence that "the defendant threatened, frightened, deceived or coerced his hostage so as to cause the hostage to remain under the defendant's control." *Id.*; *see also Carrion-Caliz*, 944 F.2d at 227 (holding that the victims were taken hostage when the defendant "frightened or deceived them sufficiently to cause them to remain in his house").

Moreover, as Judge Jackson wrote in the *Hill* litigation, the "essence of the tort of hostage taking is false imprisonment," 175 F. Supp. 2d at 46, which is defined in the District of Columbia as the unlawful "detention or restraint of one against his will, within boundaries fixed by the defendant." *Faniel v. Chesapeake & Potomac Tel. Co.*, 404 A.2d 147, 150 (D.C. 1979); *see also Abourezk v. New York Airlines*,

---

[5] In *Carrion-Caliz*, the Fifth Circuit was interpreting the Hostage Taking Act, which provides that "whoever, whether inside or outside the United States, seizes or detains and threatens to kill, to injure, or to continue to detain another person in order to compel a third person or governmental organization to do or abstain from any act . . . shall be punished by imprisonment by any term of years or for life." 18 U.S.C. § 1203(a)

Inc., 895 F.2d 1456, 1458 (D.C. Cir. 1990).[6] In this context, a plaintiff is detained whenever the defendant "deprive[s] the plaintiff of his freedom of locomotion for any length of time by force or threat of force." *Dist. of Columbia v. Gandy*, 450 A.2d 896, 899 (D.C. 1982). All the *Vine* plaintiffs, even those not in the physical control of Iraq, are alleged to have been deprived of their freedom of locomotion by being constructively confined, by force or threat of force, to safehouses and diplomatic properties.

Furthermore, those plaintiffs who were not in the physical custody of Iraq assertedly "spent most of their time in detention hiding in private residences and 'safehouses'" where they lived "under harsh conditions and in constant fear of being discovered by Iraqi security forces." *Vine* TAC ¶ 19. It is a reasonable inference from these allegations that such

---

[6] Iraq insists that analogizing "hostage taking" in FSIA to the tort of false imprisonment is inappropriate given the criminal nature of the International Convention Against the Taking of Hostages. Def.'s Reply (Civ. No. 01-2674) at 3. Because the Convention assertedly covers "penal matters," Iraq insists that the rule of lenity applies and that any ambiguity in the language of the statutory definition of "hostage taking" must therefore be resolved in its favor. In making this argument, Iraq fails to recognize that it is a defendant in a case brought under the state-sponsored terrorism exception of FSIA, which waives immunity only for *civil* claims. 28 U.S.C. § 1605(a)(7) (waiving immunity of a foreign state sponsor of terrorism in cases "in which money damages are sought"). The fact that the state-sponsored terrorism exception incorporates a definition from a treaty that covers "penal matters" does not change the fact that Iraq here is susceptible to solely civil penalties. *See United States v. Crippen*, 371 F.3d 842, 844 (D.C. Cir. 2004) ("[T]he rule of lenity requires that we interpret an ambiguous *criminal statute* in the defendant's favor.") (emphasis added). Because FSIA is not a criminal statute, and Iraq is not a criminal defendant, the rule of lenity has no application.

deprivation of freedom was "against their will." As such, all of the *Vine* plaintiffs—even those not under Iraq's direct control—were "seized" or "detained" within the meaning of the FSIA.

Iraq's second argument—that those plaintiffs who were not in the physical custody of Iraq were not hostages given that the purpose of their alleged detention was not to compel a third party to do or refrain from doing something—is likewise unconvincing. The *Vine* plaintiffs' Third Amended Complaint certainly includes allegations that all plaintiffs were used to extract concessions from the United States. Specifically, the *Vine* plaintiffs allege that all Americans, including those forced into hiding by Iraq's actions, were used by Saddam Hussein to "compel the United States and other foreign states to abstain from launching an armed attack upon Iraq as an explicit or implicit condition for the[ir] release." *Vine* TAC ¶ 27. These allegations are sufficient, at this point in the litigation, to establish that those in hiding were used "in order to compel" the United States "to do or abstain from doing an act."[7]

---

[7] In its reply brief, Iraq argues for the first time that there is a factual dispute as to whether those plaintiffs who were forced into hiding in Iraq and Kuwait were hostages as that term is defined in the FSIA, and that limited discovery is necessary to resolve this issue. Def.'s Reply (Civ. No. 01-2674), at 4-5. The court disagrees that discovery is needed at this time, for in cases where a jurisdictional determination is "inextricably intertwined with the merits of the case," that determination should be postponed until "the merits are heard." *Herbert v. Nat'l Acad. of Sciences*, 974 F.2d 192, 198 (D.C. Cir. 1992); *see also Lawrence v. Dunbar*, 919 F.2d 1525, 1530 (11th Cir. 1990). This is such a case, given that a showing that plaintiffs were held hostage would resolve the merits of this case. *See Green v. Hill*, 954 F.2d 694, 697 (11th Cir. 1992) ("Jurisdiction and the

For these reasons, the court agrees with Judge Jackson's legal conclusion in the *Hill* litigation—litigation involving identical allegations as those found here—that "American citizens denied permission to leave Kuwait and Iraq from August through mid-December, 1990," including those who took refuge in safehouses and diplomatic properties, were "'hostages' within the meaning of the FSIA" because they were "kept against their will," were "unable to move about freely," and were used "as bargaining commodities—to extract concessions from the United States and its coalition allies in exchange for their release." *Hill*, 175 F. Supp. 2d at 39, 46-47.

In reaching this decision, the court finds comfort in the fact that the position of the executive branch of the United States government at the time of the Kuwait invasion was that the Americans detained in Kuwait and Iraq were, in fact, "hostages" because they were being used by Hussein as leverage to prevent the United States and its allies from attacking Iraq and liberating Kuwait. *See Vine* TAC ¶ 15; *see also* Andrew Rosenthal, *Bush Vows Not to be Cowed by the Taking of "Hostages"; Iraq Shifts them to Targets*, N.Y. TIMES, Aug. 21, 1990, at A1 (quoting President George H.W. Bush as stating that, when referring to those American trapped in Kuwait and Iraq, because "Saddam Hussein specifically offers to trade the freedom of those citizens . . . he holds against their will in return for concessions, there can be little doubt that whatever these innocent people are called, they are in fact hostages"). Although not binding on this court, the executive branch's view is owed some deference. *Cf.*

---

merits are intertwined if a decision on one would effectively decide the other.").

Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 185-86 (1982) ("[T]he meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight."). Moreover, in another context, Congress afforded "hostage status" to all U.S. citizens trapped inside Iraq or Kuwait who were "held in custody by governmental or military authorities" of Iraq or who took "refuge within [Iraq or Kuwait] in fear of being taken into such custody." Pub. L. No. 101-513, Tit. V, § 599C, 104 Stat. 1979, 2065 (Nov. 5, 1990).

Having concluded that this court may exercise subject matter jurisdiction over the claims of *all* plaintiffs against Iraq in this consolidated matter, the court will proceed to address Iraq's other arguments in favor of dismissal.

C. The Political Question Doctrine

Iraq argues that this case presents a non-justiciable political question. The political question doctrine "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986).[8] While the "propriety of what may be done in the exercise of

---

[8] For example, the Supreme Court has held that the following foreign policy issues are non-justiciable political questions: a determination of when war begins or when a war ends, *Commercial Trust Co. v. Miller*, 262 U.S. 51, 57 (1923); recognition of foreign governments, *United States v. Belmont*, 301 U.S. 324, 328 (1937); questions concerning the diplomatic status of individuals claiming immunity, *In re Baiz*, 135 U.S. 403, 431-32 (1890); and the ratification and interpretation of treaties, *Terlinden v. Ames*, 184 U.S. 270, 286 (1902).

[foreign relations] is not subject to judicial inquiry or decision," *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918), "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." *Baker v. Carr*, 369 U.S. 186, 211 (1962). Iraq suggests that the question of its liability in these cases likewise presents a non-justiciable political question, primarily because any decision to award plaintiffs compensation would undermine the efforts of the President and Congress "to create a stable Iraq." Def.'s Mot. (Civ. No. 01-2674) at 31. The court disagrees.

This case does not require an evaluation of any executive or congressional policy decision or value judgment. Rather, it involves the liability of a foreign sovereign under a well-defined statutory scheme—a statutory scheme that was enacted by both houses of Congress and signed by the President. "[G]iven the fact that both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist [states] in federal court, . . . resolution of this matter will not exhibit 'a lack of respect due coordinate branches in government.'" *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 50 (2d Cir. 1991) (quoting *Baker*, 369 U.S. at 217) (holding that the political question doctrine does not apply to claims under the Anti-Terrorism Act for acts of terrorism perpetrated by the PLO).

Moreover, the efforts of the government to rebuild Iraq, simply put, are irrelevant to a determination of Iraq's liability under FSIA. Congress explicitly gave the courts jurisdiction over claims where the defendant, a foreign sovereign, was designated as a state sponsor of terrorism "at the time the act occurred." 28 U.S.C. § 1605(a)(7)(A). By focusing on

the foreign sovereign's designation at the time the act occurred, as opposed to when the suit is pending, Congress chose to allow a plaintiff to pursue claims against even those foreign nations whose sponsorship of terrorism ceases. For these reasons, the court declines to "convert what is essentially an ordinary tort suit into a non-justiciable political question" merely because its claims "arise in a politically charged context." *Klinghoffer*, 937 F.2d at 49.

D. Statute of Limitations

Actions brought under § 1605(a)(7) are subject to a statutory ten-year limitations period. *See* 28 U.S.C. § 1605(f) ("No actions shall be maintained under subsection (a)(7) unless the action is commenced not later than 10 years after the date on which the cause of action arose."). Congress, however, explicitly mandated that "[a]ll principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating the limitations period." *Id.* Iraq insists that all three complaints in this consolidated matter are time-barred because none of the plaintiffs filed their complaint within ten years of the date on which their causes of action arose—according to Iraq, by December 9, 1990, at the latest—and because equitable tolling, when properly applied, does not save the complaints. Although this issue is a close one, the court agrees with Iraq in part and concludes that the *Simon* and *Seyam* complaints were not timely filed.

Despite the fact that plaintiffs' injuries all occurred more than ten years before any of the complaints at issue were filed, plaintiffs nevertheless insist that their complaints are timely because the statute of

limitations on their claims did not begin to run until April 1996, when Congress added the state-sponsored terrorism exception to FSIA. *See* Pls.' Opp'n (Civ. No. 01-2674) at 12 n.4; Pls.' Opp'n (Civ. No. 03-691) at 3-6; Pls.' Opp'n (Civ. No. 03-888) at 3-6. The *Vine* plaintiffs base this suggestion on the principle that "no cause of action generally accrues until the plaintiff has the right to enforce his cause." *See* Pls.' Opp'n (Civ. No. 01-2674) at 12 n.4 (quoting *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353, 1458 (5th Cir. 1972)). This argument, however, confuses what it means for a cause of action to "arise" and what it means for a cause of action to "accrue," a distinction important to this case. A claim "arises" on the date that the action in question occurred, yet does not "accrue" until a prior disability to suit is removed. *See Heinrich v. Sweet*, 118 F. Supp. 2d 73, 79-80 (D. Mass. 2000) (explaining the "subtle, yet important, difference between the two words"); *see also Kaplan v. Shure Bros.*, 153 F.3d 413, 422 (7th Cir. 1998) ("[A] cause of action can 'arise' before it 'accrues.'); *Van Den Hul v. Baltic Farmers Elevator Co.*, 716 F.2d 504, 510 n.4 (8th Cir. 1983) (noting that "in certain contexts, the words 'accrue' and 'arise' have significantly different meanings."); *Abramson v. P.J. Currier Lumber Co.*, 2001 U.S. Dist. LEXIS 1039, at *2-3 (D.N.H. Jan. 17, 2001) ("The point at which a cause of action 'arises' can be different from the point at which it 'accrues.'"). Given this distinction, plaintiffs' argument that the statute of limitations did not begin to run until 1996 must be rejected, for, according to FSIA, the statute of limitations began when their cause of action "arose," i.e., when the

action in question occurred.[9] Plaintiffs' complaints make clear that the actions in question occurred, and therefore their cause of action arose, by December 9, 1990, at the latest.

Having determined that plaintiffs' claims arose, at the latest, in December 1990, plaintiffs had until December 2000 to file their complaint, absent tolling. None of the complaints in this consolidated matter were filed by that date; the complaint in *Vine*, Civ. No. 01-2674, was filed on December 27, 2001; the

---

[9] The *Simon* and *Seyam* plaintiffs cite a number of cases that assertedly stand for the proposition that Congress specifically allowed for the bringing of suits, absent tolling, up to ten years from the date of *enactment* of the state-sponsored terrorism exception, rather than ten years from the date the cause of action arose. Pls.' Opp'n (Civ. No. 03-691) at 3-6; Pls.' Opp'n (Civ. No. 03-888) at 3-6. The court notes that the overwhelming majority of the cases cited involve default judgments, for which any statute of limitations argument was necessarily waived. In only three of those cases was the statute of limitations even mentioned, and those references are dicta given the procedural posture of the case. *Peterson v. Islamic Republic of Iran*, 264 F. Supp. 2d 46, 60 (D.D.C. 2003); *Polhill v. Islamic Republic of Iran*, 2001 U.S. Dist. LEXIS 15322, at *13 n.3 (D.D.C. Aug. 23, 2001); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62, 68-69 (D.D.C. 1998). In one of the two cases cited by plaintiffs that was not decided by default, the defendant failed to raise the statute of limitations defense and therefore waived it as well. *Kilburn v. Republic of Iran*, 277 F. Supp. 2d 24 (D.D.C. 2003). Finally, in the sole disputed matter cited by plaintiffs in which the statute of limitations was raised, the court recognized that the statute of limitations began to run at the time the underlying acts occurred, but were tolled until immunity was waived. *Wyatt v. Syrian Arab Republic*, 2005 U.S. Dist. LEXIS 21744, at *35 (D.D.C. 2005).

In sum, the cases cited by the *Simon* and *Seyam* plaintiffs are insufficient to convince this court that the statute of limitations on plaintiffs' claims did not begin to run when 28 U.S.C. § 1605(f) says they did, i.e., when "the cause of action arose."

complaint in Simon, Civ. No. 03-691, was filed on March 18, 2003; and the complaint in *Seyam,* Civ. No. 03-888, was filed on April 15, 2003. Accordingly, the court must analyze whether any "principle[] of equitable tolling" acts to extend the period for filing, such that plaintiffs' claims are not time-barred.

Importantly, the D.C. Circuit has held that equitable tolling "does not bring about an automatic extension of the statute of limitations by the length of the tolling period." *Phillips v. Heine*, 984 F.2d 489, 492 (D.C. Cir. 1993) (citing *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1990)). Rather, under *Phillips*, even where a plaintiff establishes circumstances justifying equitable tolling, the plaintiff is given extra time to file a claim "*only* if he needs it." *Id.* (emphasis in original). If, however, the plaintiff does not "need it, there is no basis for depriving the defendant of the protection of the statute of limitations.'" *Id.* (quoting *Cada*, 920 F.2d at 452). Therefore, in order to "advance [the] important interests in evidentiary accuracy and repose," a deadline will only be tolled "by a reasonable period after the tolling circumstance [is] mended." *Id.*; *see also Chung v. Dep't of Justice*, 333 F.3d 273, 279 (D.C. Cir. 2003) (stating that equitable tolling "merely ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit.").

Applying these principles, the D.C. Circuit held in *Phillips* that a plaintiff is not entitled to the benefit of the equitable tolling doctrine when the limitations period has not run by the time the plaintiff discovers all the facts necessary to support her claim. For example, in *Phillips*, the plaintiff discovered the necessary facts on February 26, 1990, and the

statute of limitations, without any tolling, expired on March 21, 1990. *Id.* Because nothing had prevented the plaintiff "from gathering information in the preceding years," and because "more than three weeks remained" in the limitations period after all the necessary facts were discovered, the D.C. Circuit questioned whether there was "any need to extend the statute at all." *Id.* Accordingly, the D.C. Circuit affirmed the district court's decision to dismiss the case on the ground that it was time-barred. *Id.*; *see also Cada*, 920 F.2d at 453 ("When as here the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so.").

As noted above, FSIA was amended in 1996 to allow a plaintiff to pursue a claim against a foreign state for its involvement in certain acts of terrorism. *See* 28 U.S.C. § 1605(f). In doing so, Congress specifically stated that the ten-year limitations period was tolled for "the period during which the foreign state was immune from suit." However, because more than four years remained in the limitations period at the time Iraq's immunity was abrogated, the "presumption" that plaintiffs could have brought suit "within the statutory period" applies. *See Cada*, 920 F.2d at 452; *Phillips*, 984 F.2d at 492. Accordingly, under D.C. Circuit precedent, the fact that Iraq was immune from suit for the first six years of the statutory period applicable to plaintiffs' claims does not give rise to any equitable reason to toll the statutory deadline.[10]

---

[10] The court recognizes that Judge Urbina concluded, in *Wyatt v. Syrian Arab Republic*, 2005 U.S. Dist. LEXIS 21744, at

Another principle of equitable tolling, however, *is* applicable here. In 1974, the Supreme Court held that "the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties to the suit had the suit been permitted to continue as a class action." *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 553-54 (1974); *see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983) (affirming that *American Pipe* tolling applies to all asserted members of the class, regardless of whether they choose to file their own suits or to intervene in the pending action).

As described previously, the *Hill* litigation before Judge Jackson was a putative class action whose class, had class certification been granted, would have included all of the plaintiffs in these consolidated matters.[11] As such, *American Pipe*

---

*35 (D.D.C. 2005), that a plaintiff was allotted a full ten years after the tolling period to bring her claim under FSIA. As discussed above, this court disagrees, and believes that such a conclusion is inconsistent with the D.C. Circuit's holding in *Phillips*.

[11] Iraq argues that the claims of the "plaintiffs in hiding" were not part of the putative class in *Hill* and thus cannot get the benefit of *American Pipe* tolling. Def.'s Mot. (Civ. No. 01-2674) at 11. The class in *Hill* was described to include "[a]ll American citizens who were present in Iraq or Kuwait at any time between August 2, 1990 through December 1990 and who, during that period, were taken hostage by Defendant." *Id.* (quoting *Hill* Compl. ¶ 41). Therefore, a determination of whether the "plaintiffs in hiding" are included in this class description turns on whether those plaintiffs were "hostages." As the court has already determined that they were, *supra* at 10, Iraq's argument that they may not benefit from *American Pipe* tolling is rejected.

tolling applies.[12] The *Hill* litigation was filed on December 15, 1999, before the statute of limitations expired. On June 29, 2001, Judge Jackson denied the *Hill* plaintiffs' motion for class certification.[13]

Iraq also argues that the claims of the plaintiffs' spouses cannot benefit from the full 18-month period that the motion for class certification in *Hill* was pending, given that their claims were not added until more than seven months after the original *Hill* complaint was filed. This fact, according to Iraq, reduces the *American Pipe* tolling period for the plaintiffs' spouses to a total of eleven months, a period of time assertedly insufficient to make the plaintiffs' spouses claims timely. This argument, however, fails to recognize that amendments adding a spouse's claim for loss of consortium relate back to the date on which the underlying claim was filed. *See, e.g.*, *Costello v. Balzarini*, 2005 U.S. Dist. LEXIS 10392, at *4 (D. Vt. May 24, 2005); *Hoch v. Venture Enters., Inc.*, 473 F. Supp. 541, 542 (D.V.I. 1979); *see also* CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1688 (3d ed. 2001). Moreover, this argument is ultimately irrelevant, given that the court concludes, *infra*, that plaintiffs are not entitled to an automatic extension of the statutory period equal to the time the motion for class certification was pending.

[12] Iraq notes that *American Pipe* tolling typically does not apply to class claims in subsequent class actions. The court makes no findings with regard to the viability of plaintiffs' class claims, reserving such a determination until a motion for class certification is ripe. However, the court does note that all plaintiffs' *individual* claims are subject to *American Pipe* tolling, notwithstanding the fact that they also filed class claims. *See, e.g.*, *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *Korwek v. Hunt*, 827 F.2d 874, 878 (2d Cir. 1987); *In re Crazy Eddie Sec. Litig*, 747 F. Supp. 850, 856 (E.D.N.Y. 1990).

[13] In a later filed memorandum opinion, Judge Jackson explained that class certification was denied "in light of the fact that the case was proceeding by default; the uncertainty of the numbers of U.S. citizens who could actually qualify as a victim or claimant; and the significant variations in the experiences of

Plaintiffs insist that the statutory deadline was tolled thereafter for eighteen months and fourteen days—an amount of time equal to the time that the class certification issue was pending—until late 2003. Iraq disagrees, contending that under the holding in *Phillips*, plaintiffs' claims were only equitably tolled for a reasonable amount of time after the class certification issue was resolved, and that by taking almost six months to file their complaint, plaintiffs' delay was unreasonable.

The court agrees with Iraq's legal argument and concludes that the holding in *Phillips*—that "equitable tolling . . . merely ensures that the plaintiff is not, by dint of circumstances beyond his control, deprived of a 'reasonable time' in which to file suit." *Chung*, 333 F.3d at 279—applies equally to *American Pipe* tolling as well. That is, a plaintiff who would have been a member of a class action, had it been certified, does not receive an automatic extension of the statute of limitations by the length of time that the class certification issue is pending. Instead, the deadline is tolled only "by a reasonable period after the tolling circumstance [is] mended." *Phillips*, 984 F.2d at 492. This conclusion inevitably flows from the D.C. Circuit's holding that equitable tolling does not provide an automatic extension of a statute of limitations and the Supreme Court's recognition that *American Pipe* tolling is a type of equitable tolling, *see Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 96 n.3 (1990) (citing *American Pipe* as an example of equitable tolling).

---

the hostages, including hardships endured and compensable injuries suffered." 175 F. Supp. 2d at 39 n.5.

While the court agrees with Iraq's legal argument, it disagrees with its factual suggestion that six months was an unreasonable amount of time for the *Vine* plaintiffs to have waited to file their complaint. A number of factors lead this court to this conclusion. First, the *Vine* plaintiffs suggest that Judge Jackson's class certification decision was not "definitive," and that he later encouraged them to "continue to pursue class certification, which he said he would . . . be inclined to grant" had he retained the case. Pls.' Opp'n (Civ. No. 01-2674) at 16-17. Iraq never disputes this claim. Second, and perhaps most importantly, for the eighteen months the class certification motion was pending, and for six months thereafter, Judge Jackson consistently and regularly allowed plaintiffs to amend their complaint to add more named plaintiffs. Under the doctrine of relation back, as embodied in Rule 15(c) of the Federal Rules of Civil Procedure, the claims of these additional plaintiffs "relate back" to the date of the original complaint for purposes of conducting any statute of limitations analysis. *See Leachman v. Beech Aircraft Corp.*, 694 F.2d 1301, 1308 (D.C. Cir. 1982); *Miller v. Air Line Pilots Ass'n*, 2000 U.S. Dist. LEXIS 8797, at *9 (D.D.C. Mar. 30, 2000). In light of Judge Jackson's pattern of granting such motions to amend, a plaintiff with a similar claim could reasonably have expected to seek compensation for their injuries by participating in the *Hill* litigation. However, in early December 2001, Judge Jackson indicated that he would not allow any more plaintiffs to be added to the *Hill* matter. Within three weeks, the *Vine* plaintiffs filed their complaint in Civil Action No. 01-2674. Given this procedural history, the court believes that the *Vine* plaintiffs acted diligently and filed their complaint within a reasonable time of

discovering that they could not be added to the *Hill* litigation. Accordingly, the court believes that equitable tolling is appropriate and their claims are timely.[14]

The plaintiffs in *Simon* and *Seyam*, however, were not so diligent. They waited until 2003 to file their complaint, almost two years after Judge Jackson denied class certification in *Hill* and more than a year after he indicated in writing that he would not allow any more plaintiffs to join the *Hill* litigation. Under the principles espoused in *Phillips*, this length of time exceeds what was reasonably necessary and, therefore, precludes the application of equitable tolling. Accordingly, the complaints in *Simon* and *Seyam* are time-barred and must be dismissed.

E. Failure to State a Claim

In their third amended complaint, the *Vine* plaintiffs assert a claim based on federal statutory law, three claims based on federal common law, three claims based on state common law, and four claims based on foreign law. Iraq insists that these claims are either not legally cognizable or are not applicable to the facts at hand, and accordingly moves to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[15] Based on the following

---

[14] The *Vine* plaintiffs have amended their complaint three times and have moved to add additional plaintiffs on at least two other occasions. As noted above, those plaintiffs' claims are timely under the doctrine of relation back. *Leachman*, 694 F.2d at 1308.

[15] A court may grant a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) 15 "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Martin v. Ezeagu*, 816 F. Supp. 20, 23 (D.D.C. 1993) (internal quotations omitted); *Conley v.*

analysis, the court agrees in part, and will dismiss the federal statutory and federal common law claims.

1. Federal Statutory Law

Count II of the *Vine* TAC alleges that Iraq violated the so-called Flatow Amendment, through which Congress created a specific cause of action against any "official, employee, or agent of a foreign state" for acts over which the court may maintain jurisdiction under the state-sponsored terrorism exception to sovereign immunity. 28 U.S.C. § 1605 note. The Flatow Amendment is not a statute of "general application" but instead, by its plain language, limits its scope to "officials or agents of foreign states." *Dammarell v. Islamic Republic of Iran*, 2005 U.S. Dist. LEXIS 5343, *93 (D.D.C. Mar. 29, 2005). Recognizing this limitation, the D.C. Circuit has held that neither the state-sponsored terrorism exception of FSIA, "nor the Flatow Amendment, nor the two considered in tandem, creates a private right of action against a foreign government." *Cicippio-Puleo*, 353 F.3d at 1033. As the sole defendant in the *Vine* matter is a foreign government, and not an official or agent of that foreign government, Iraq moves to dismiss the Flatow Amendment claim in the *Vine* TAC.

Gibson, 355 U.S. 41, 45-46 (1957) (stating that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). In addition, the court must construe the complaint in a light most favorable to the plaintiff and must accept as true all reasonable factual inferences drawn from well-pleaded factual allegations. *In re United Mine Workers Employee Benefit Plans Litig.*, 854 F. Supp. 914, 915 (D.D.C. 1994); *Schuler v. United States*, 617 F.2d 605, 608 (D.C. Cir. 1979).

Despite the fact that the text of the Flatow Amendment does not directly create a cause of action against a government defendant, the *Vine* plaintiffs nonetheless argue that Iraq can be held liable indirectly, by way of § 1606 of FSIA. Section 1606 provides that, as to any claim for relief with respect to which a foreign state is not entitled to immunity, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 1606.[16] This judicial officer has previously rejected a similar argument and held that the Flatow Amendment should not be expanded to apply to foreign states through application of § 1606. *Pugh v. Socialist People's Libyan Arab Jamahiriya*, 2006 U.S. Dist. LEXIS 58033, at *35-42 (D.D.C. May 11, 2006). In so holding, this court adopted the reasoned decision of Judge Bates in *Dammarell v. Islamic Republic of Iran*, who had provided four reasons why "the cause of action in the Flatow Amendment cannot be read to apply to foreign states through section 1606": (1) the text of the Flatow Amendment applies only to officials, employees, or agents of a foreign state, not a foreign state itself; (2) the legislative history does not contain any indication that Congress nonetheless intended to create a private cause of action against a foreign state; (3) the statute does not "obviously extend to *private individuals* within the meaning of section 1606," 2005 U.S. Dist. LEXIS 5343, at *97-98 (emphasis added); and (4) such a holding would be "in at least some tension with *Cicippio-Puleo*," *id.* at 97; *see also Holland*, 2005 U.S. Dist. LEXIS 40254,

---

[16] The effect of section 1606 on the liability of foreign states under the Flatow Amendment was not explicitly addressed in *Cicippeo-Puleo*.

at *41-44 (Kollar-Kotelly, J.) (similarly adopting Judge Bates's reasoning in *Dammarell* and refusing to hold a foreign government liable under the Flatow Amendment).[17]

Today, this court reiterates its agreement with Judge Bates and Judge Kollar-Kotelly and again concludes that Congress did not intend to create a cause of action under the Flatow Amendment against foreign states through § 1606 of FSIA. As the D.C. Circuit has stated, "it is for Congress, not the courts, to decide whether a cause of action should lie against foreign states." *Cicippio-Puleo*, 353 F.3d at 1036. In situations where "Congress has not expressly recognized" a cause of action against foreign states, courts should "decline to imply" one. *Id* Accordingly, the court dismisses the *Vine* plaintiffs' claim against Iraq under the Flatow Amendment.

2. Federal Common Law

Additionally, Iraq argues that the three federal common law claims found in Counts I, VI, and VII must also be dismissed for failure to state a claim. The *Vine* plaintiffs disagree, contending that "it is plain that the complaint states a viable federal common law cause of action against Iraq" in light of the recent decision by the Supreme Court in *Sosa v.*

---

[17] The court notes that Judge Jackson, in *Dodge v. Islamic Republic of Iran*, reached a contrary conclusion and held, without elaboration, that a plaintiff, pursuant to section 1606, may sue a foreign state "under *any* cause of action arising from common law, foreign law, or federal statute which might ordinarily give rise only to individual liability," including the Flatow Amendment. 2004 U.S. Dist. LEXIS 29045, at *12 (D.D.C. Aug. 25, 2004) (emphasis added).

Alvarez-Machain, 542 U.S. 692 (2004). Pls.' Opp'n (Civ. No. 01-2674) at 32.

In *Pugh*, this court discussed at length, and rejected, the argument that federal common law provides a viable cause of action against a foreign sovereign under FSIA. *See Pugh*, 2006 U.S. Dist. LEXIS 58033, at *42-49. Specifically, this court noted that, in 2003, the D.C. Circuit "strongly signaled that a federal common law of tort is incompatible with section 1606 of FSIA . . . because section 1606 'instructs [courts] to find the law, not to make it.'" *Id.* at *45 (quoting *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 338 (D.C. Cir. 2003)). As such, the D.C. Circuit's holding "reflect[ed] the modern rule that the federal common law should only be employed in the rarest of circumstances." *Id.* (quoting *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *78); *see also* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 6.1, at 354 (4th ed. 2003) ("There long has been a strong presumption against the federal courts fashioning common law to decide cases.").

Moreover, this court also rejected the argument that the *Pugh* plaintiffs' allegations fell "within the narrow category of cases that the Supreme Court has recently pronounced to be actionable" in *Sosa*, in large part because *Sosa* arose in the context of the Alien Tort Claims Act ("ATCA"), and not FSIA. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *47. That difference was "fatal" to the *Pugh* plaintiffs' argument. *Id.* Because FSIA, unlike the ATCA, details "'precisely the sort of claims that a plaintiff may bring when suing under a waiver of immunity provided by the FSIA,'" *id.* (quoting *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *90), the justification for exercise of federal common law was absent. *Id.* (citing 19

CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4514, at 480-81 (2d ed. 1996) ("Insofar as one important justification for the exercise of federal common law is that Congress has not spoken on the matter before the court, that justification is removed once Congress has spoken on a particular matter.")); *see also City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) (stating that the Supreme Court has "always recognized that federal common law is subject to the paramount authority of Congress" and may be resorted to only "[in] absence of an applicable Act of Congress") (internal quotations and citations omitted). Because Congress had spoken on the particular matter at issue, by enacting section 1606 of FSIA, this court denied the plaintiffs' request to fashion a cause of action against Iraq under federal common law. *Pugh*, 2006 U.S. Dist. LEXIS 58033, at *48.

The logic in *Pugh* is equally applicable to this matter. Congress has addressed the claims that are available against a foreign country whose immunity has been waived, by enacting FSIA, and therefore this court may not resort to federal common law. Accordingly, plaintiffs' federal common law claims are dismissed.

3. State Common Law and Foreign Law Claims

In Counts III through IX, the *Vine* plaintiffs asserts three state common law claims—false imprisonment, intentional infliction of emotional distress, and loss of consortium—and four claims based on the law of Iraq and Kuwait. In the wake of the D.C. Circuit's opinion in *Cicippio-Puleo*, district courts in this jurisdiction have uniformly held that state or foreign law may be used to hold foreign states liable for acts

of terrorism. *See, e.g.*, *Holland*, 2005 U.S. Dist. LEXIS 40254, at *63-65; *Price v. Socialist People's Libyan Arab Jamahiriya*, 384 F. Supp. 2d 120, 132 (D.D.C. 2005); *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *55-56.

Iraq contends that these cases are in error, suggesting that Congress preempted state and foreign law by enacting the Flatow Amendment. Def.'s Mot. (Civ. No. 01-2674) at 23-25. Iraq's argument is untenable, for as other courts in this jurisdiction have held, neither the text nor the legislative history of the Flatow Amendment supports the assertion that the Congress intended to "occupy the field" to the exclusion of state or foreign law. *Dammarell*, 2005 U.S. Dist. LEXIS 5343, at *50-53. Rather, "[f]ar from *preempting* state law in section 1605(a)(7) cases, the FSIA *invites*" the application of state and foreign law "through section 1606." *Id.* at *51 (emphasis in original); *see also Holland*, 2005 U.S. Dist. LEXIS 40254, at *51-52; *Price*, 384 F. Supp. 2d at 132-33. Accordingly, the court denies Iraq's motion to dismiss the *Vine* plaintiffs' state common law and foreign law claims.[18]

---

[18] In each of the cases cited above, the courts recognized that foreign law was an available avenue of relief under FSIA, but determined, after applying choice of law principles to the facts at hand, that application of state law was more appropriate. This court makes no finding as to whether state law or foreign law should be applied in this case, but rather simply concludes that neither are preempted by the Flatow Amendment. Any choice of law analysis will have to wait until after the parties have briefed the issue.

III. CONCLUSION

For the aforementioned reasons, it is this 7th day of September, 2006, hereby

ORDERED that Iraq's Motion to Dismiss in Civil Action 01-2674 [#44] is **GRANTED**

IN PART and **DENIED IN PART**, as set forth in this Memorandum Opinion; and it is further

ORDERED that Counts I and II of the Third Amended Complaint in Civil Action

01-2674 are **DISMISSED**;

ORDERED that Iraq's Motion to Dismiss in Civil Action 03-691 [#14] is **GRANTED**;

and it is further;

ORDERED that Iraq's Motion to Dismiss in Civil Action 03-888 [#14] is **GRANTED**.

Henry H. Kennedy, Jr.
United States District Judge

125 (13) (19)

Nos. 07-1090 & 08-539

IN THE

Supreme Court of the United States

REPUBLIC OF IRAQ,
Petitioner,
v.
JORDAN BEATY, et al.,
Respondents.

REPUBLIC OF IRAQ, et al.,
Petitioners,
v.
ROBERT SIMON, et al.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX
Volume 2 of 2 (Pages 219-428)

JONATHAN S. FRANKLIN*
ROBERT A. BURGOYNE
TILLMAN J. BRECKENRIDGE
FULBRIGHT & JAWORSKI L.L.P.
801 Pennsylvania Ave, N.W.
Washington, D.C. 20004
(202) 662-0466
jfranklin@fulbright.com

TIMOTHY B. MILLS
MAGGS & MCDERMOTT LLC
910 17th St., N.W., Ste. 800
Washington, D.C. 20006
(202) 457-8090

Counsel for Petitioners
* *Counsel of Record*

ANDREW C. HALL*
HALL, LAMB AND HALL, P.A.
2665 South Bayshore Drive
Miami, Florida 33133
(305) 374-5030
andyhall@hlhlawfirm.com

Counsel for Beaty Respondents

STEPHEN A. FENNELL*
STEPTOE & JOHNSON LLP
300 Connecticut Ave, N.W.
Washington, D.C. 20036
(202) 429-3000
sfennell@steptoe.com

Counsel for Simon Respondents

[*Additional Counsel Listed on Inside Cover*]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002
PETITIONS FOR WRITS OF CERTIORARI FILED
FEB. 19, 2008 (07-1090) AND OCT. 22, 2008 (08-539)
CERTIORARI GRANTED JANUARY 9, 2009

MICHAEL RIPS
ANTHONY A. ONORATO
JUSTIN B. PERRI
STEPTOE & JOHNSON LLP
750 Seventh Avenue
New York, NY 10019
(212) 506-3900

Counsel for Simon Respondents

TABLE OF CONTENTS

VOLUME 1

App.	Name	Page
A	Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 07-7057 (*Beaty*)	1
B	Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 06-7175 (*Simon*)	8
C	Relevant Docket Entries from the United States Court of Appeals for the District of Columbia Circuit, No. 06-7178 (*Seyam*)	18
D	Relevant Docket Entries from the United States District Court for the District of Columbia, No. 1:03-cv-00215-JDB (*Beaty*)	20
E	Relevant Docket Entries from the United States District Court for the District of Columbia, No. 1:03-cv-00691-HHK (*Simon*)	28
F	Relevant Docket Entries from the United States District Court for the District of Columbia, No. 1:03-cv-00888-HHK (*Seyam*)	33

G	Relevant Docket Entries from the United States District Court for the District of Columbia, No. 1:01-cv-02674-HHK (*Vine*)	39
H	Excerpts from Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00215 (*Beaty*), filed Feb. 10, 2003	47
I	Excerpts from Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00691 (*Simon*), filed March 18, 2003	50
J	Excerpts from Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00888 (*Seyam*), filed April 15, 2003	57
K	Statement of Interest of the United States in United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*), filed March 15, 2004	64
L	Plaintiffs' Response to the Statement of Interest of the United States in United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*), filed April 14, 2004	99
M	United States' Reply in Support of Its Statement of Interest in United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*), filed May 5, 2004	130

N	Excerpts from First Amended Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00691 (*Simon*), filed Sept. 14, 2004	161
O	Excepts from Second Amended Complaint in United States District Court for the District of Columbia, No. 1:03-cv-00888 (*Seyam*), filed Oct. 8, 2004	171
P	Excerpts from Third Amended Complaint in United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*), filed May 23, 2005	180
Q	Judgment in United States District Court for the District of Columbia, No. 1:03-cv-00691 (*Simon*) (Sept. 7, 2006)	186
R	Judgment in United States District Court for the District of Columbia, No. 1:03-cv-00888 (*Seyam*) (Sept. 7, 2006)	187
S	Memorandum Opinion and Order of United States District Court for the District of Columbia, No. 1:01-cv-02674 (*Vine*) (Sept. 7, 2006), 459 F. Supp. 2d 10 (D.D.C. 2006)	188

VOLUME 2

T	Memorandum Opinion of United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*) (March 20, 2007)	219
U	Order of United States District Court for the District of Columbia, No. 1:03-cv-0215 (*Beaty*) (March 20, 2007)	309
V	Order denying initial hearing en banc in United States Court of Appeals for the District of Columbia Circuit, No. 07-7057 (*Beaty*) (Nov. 6, 2007)	311
W	Order granting motion for summary affirmance in United States Court of Appeals for the District of Columbia Circuit, No. 07-7057 (*Beaty*) (Nov. 21, 2007)	313
X	Order requesting briefing on Section 1083 of the National Defense Authorization Act for the Fiscal Year 2008, in United States Court of Appeals for the District of Columbia Circuit, Nos. 06-7175 and 06-7178 (*Simon / Seyam*) (Feb. 4, 2008)	315
Y	Opinion of United States Court of Appeals for the District of Columbia Circuit, No. 06-7175 (*Simon / Seyam*) (June 24, 2008), 529 F.3d 1187 (D.C. Cir. 2008)	317

Z	Judgment of United States Court of Appeals for the District of Columbia Circuit, No. 06-7175 (*Simon / Seyam*) (June 24, 2008)	339
AA	Foreign Assistance Act of 1961, Pub. L. 87-195, § 307, 75 Stat. 424 (1961), codified as amended at 22 U.S.C. § 2227	341
AB	Foreign Assistance Act of 1961, Pub. L. 87-195, § 620A, 75 Stat. 424 (1961), codified as amended at 22 U.S.C. § 2371	344
AC	Iraq Sanctions Act of 1990, Pub. L. 101-513, 104 Stat. 1979 (1990), as amended	347
AD	28 U.S.C. § 1605(a)(7) (repealed 2008)	365
AE	National Defense Authorization Act for the Fiscal Year 2008, Pub. L. 110-181, § 1083, 122 Stat. 338 (2008)	367
AF	*Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001)	380
AG	Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 7, 2003)	396
AH	Executive Order 13,303, 68 Fed. Reg. 31,931 (May 22, 2003)	398

AI	Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq, 39 Weekly Comp. Pres. Doc. 647 (May 22, 2003)	402
AJ	Letter to Congressional Leaders Reporting on Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions, 39 Weekly Comp. Pres. Doc. 1129 (Aug. 28, 2003)	405
AK	Concurrent Resolution, S. Con. Res. 61, 110th Cong. (Dec. 19, 2007)	409
AL	Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008," 43 Weekly Comp. Pres. Doc. 1641 (Dec. 28, 2007)	411
AM	Daily Digest, 154 Cong. Rec. H1 (daily ed. Jan. 3, 2008)	415
AN	Statement of Hon. John Conyers, Jr., 154 Cong. Rec. E46-47 (daily ed. Jan. 17, 2008)	417
AO	Daily Digest, 154 Cong. Rec. S53-57 (daily ed. Jan. 22, 2008)	421

AP Presidential Determination No. 2008-9 of January 28, 2008, Waiver of Section 1083 of the National Defense Authorization Act for the Fiscal Year 2008, 73 Fed. Reg. 6571 (Feb. 5, 2008) 422

APPENDIX T

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ,** **Defendant.**	**Civil Action No. 03-0215 (JDB)**

MEMORANDUM OPINION

United States citizens Kevin Beaty and William Barloon were detained and allegedly held as hostages by the former Iraqi regime in the 1990s. Along with other former detainees and their spouses, Beaty and Barloon filed suit against Iraq in 1996, eventually obtaining a default judgment against it. *See Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001) ("*Daliberti II*"); *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38 (D.D.C. 2000) ("*Daliberti I*"). The plaintiffs in this case—Jordan Beaty, Austin

Makenzie Beaty, William R. Barloon, Bryan C. Barloon, and Rebecca L. Barloon—are the children of Kevin Beaty and William Barloon. Invoking the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1605(a)(7), plaintiffs seek damages against Iraq for the emotional distress that they allegedly suffered during their fathers' captivity.

Iraq has filed a motion to dismiss in which it asserts that plaintiffs have failed to state a claim upon which relief can be granted, that this Court lacks subject-matter jurisdiction, and that plaintiffs' claims are either nonjusticiable or preempted because of their potential to undermine United States foreign policy. The United States has submitted a statement of interest reaffirming its position that actions taken by the political branches after the filing of the original complaint divest this Court of jurisdiction. For their part, plaintiffs maintain that recent decisions of the D.C. Circuit and this Court establish that there is a jurisdictional basis for their suit, that their claims are justiciable, and that they are entitled to partial summary judgment based on the facts established in the *Daliberti* case. Pending before the Court are defendant's motion to dismiss and plaintiffs' motion for partial summary judgment. For the reasons set forth below, the Court will grant in part and deny in part both motions.

BACKGROUND

The facts underlying the detention and captivity of Beaty and Barloon are recounted at length in the two reported decisions in the *Daliberti* litigation, *see* 146 F. Supp. 2d at 21-23; 97 F. Supp. 2d at 41-42, and have not been disputed here. (These facts are drawn

from plaintiffs' Third Amended Complaint, as well as the *Daliberti* opinions, of which this Court may take judicial notice. *See Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 263 (D.D.C. 2006); *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 109 n.6 (D.D.C. 2005). Beaty and Barloon resided in Kuwait and worked in civilian capacities following the conclusion of the Persian Gulf War in 1991. Beaty worked as a drilling supervisor on an oil rig, and Barloon supervised aircraft maintenance and overhaul. Third Am. Compl. ¶ 7. In April of 1993, Beaty was detained by Iraqi border guards and taken at gunpoint first to Basra and later to Baghdad. *Id.* at ¶¶ 9-11. For a period of 205 days, Beaty lived in squalid conditions in two Iraqi prisons, where he was deprived of food and water, as well as medication for his heart condition. *Id.* at ¶¶ 10-11. Iraq conditioned Beaty's release on either the lifting of the economic sanctions that had been imposed upon it or a significant monetary ransom. *Id.* at ¶ 12. Only after efforts by Beaty's wife Robin and prominent political figures, including former President Jimmy Carter and then-Oklahoma Senator David Boren, did Iraq release Beaty. *Id.* at ¶¶ 12-13.

Barloon was detained by an Iraqi border guard in March of 1995. *Id.* at ¶ 14. Like Beaty, he was transported first to Basra and then to Baghdad, where, again like Beaty, he was eventually held at the now infamous Abu Ghraib prison. *Id.* at ¶ 16. During his 126 days of detention, Barloon was deprived of food, water, and other necessities. *Id.* at ¶ 17. His captors beat him and, on one occasion, subjected him to a mock execution. *Id.*; *see Daliberti II*, 146 F. Supp. 2d at 23. Diplomatic efforts by the

Clinton Administration, and in particular the intervention of then-Congressman Bill Richardson, led to Barloon's release in late 1995. Third Am. Compl. ¶¶ 18-20.

Beaty and Barloon, joined by their wives, two other detainees, and those detainees' spouses, filed suit against Iraq in May of 1996. The four men sought damages for kidnapping, false imprisonment, and torture; their wives sought recovery for intentional infliction of emotional distress and loss of consortium. *See Daliberti I*, 97 F. Supp. 2d at 41-42. The jurisdictional basis for the suit was provided by legislation that Congress had enacted just weeks earlier: section 221(a) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See* Pub. L. 104-132, § 221(a), 110 Stat. 1214, 1242-43 (April 24, 1996). A key provision in that legislation deprived countries designated as state sponsors of terrorism of sovereign immunity from suits seeking money damages "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." *Id.* (codified at 28 U.S.C. § 1605(a)(7)).

After the Clerk of the Court entered default against it, Iraq appeared by counsel and filed a motion to dismiss the civil suit. *Daliberti I*, 97 F. Supp. 2d at 42. Judge Friedman concluded that the plaintiffs had "met their burden of showing that the actions they complain of fall under the state sponsored terrorism exception to foreign sovereign immunity in 28 U.S.C.

1607(a)(7)," specifically by demonstrating that they had been the victims of "torture" and "hostage taking"—two of the acts enumerated in the statute. *Id.* at 45-46. He also rejected Iraq's contentions that the state-sponsored terrorism exception is unconstitutional and that adjudication of the suit was barred by the act-of-state doctrine. *Id.* at 48-55. Accordingly, he denied Iraq's motion to dismiss. After its motion was denied, Iraq's counsel withdrew from the case, and the Clerk of the Court once again entered default against Iraq. The case was then transferred to Judge Oberdorfer, who conducted a four-day bench trial, issued findings of fact, and entered final judgment in favor of the plaintiffs. *Daliberti II*, 146 F. Supp. 2d at 21. That judgment awarded millions of dollars in damages to the male plaintiffs for the physical hardships suffered during their captivity and their psychological problems since release, as well as millions of dollars to the men's wives for "loss of the society and companionship of their husbands." *Id.* at 24, 26-27.

Not covered by the *Daliberti* judgment, however, were the Beaty and Barloon children. Those five children, plaintiffs here, filed a complaint in February of 2003 seeking monetary damages for the "mental anguish, pain and suffering during the period of their fathers' incarceration." Compl. ¶ 10. (The filing of their complaint almost two years after the *Daliberti* judgment was not just happenstance: a ten-year statute of limitations governs cases brought under § 1605(a)(7), *see* 28 U.S.C. § 1605(f), and Beaty's detention and captivity began and ended in 1993.) But shortly after plaintiffs filed their complaint, events outside and inside the courthouse dramatically altered the existing legal and political

landscape. A United States-led coalition commenced a military invasion of Iraq on March 20, 2003, eventually toppling the regime headed by Saddam Hussein. In support of the war effort, Congress passed the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003). The EWSAA provided funding for military operations in Iraq and homeland security measures in the United States. It also gave the President the authority to suspend certain laws that had barred aid to Iraq and to "make inapplicable with respect to Iraq . . . any other provision of law that applies to countries that have supported terrorism." Pub. L. No. 108-11, § 1503, 117 Stat. at 579. President George W. Bush exercised the authority granted by Congress when he issued Presidential Determination 2003-23 on May 7, 2003. Echoing the language of the EWSAA, the Presidential Determination purported to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 . . . and any other provision of law that applies to countries that have supported terrorism." 68 Fed. Reg. 26,459 (May 7, 2003). The President explained in a message to Congress the following week his understanding that the laws made "inapplicable" to Iraq in Presidential Determination 2003-23 included 28 U.S.C. § 1605(a)(7), the state-sponsored terrorism exception to the FSIA. *See* 39 Weekly Comp. Pres. Doc. 647, 647-48 (May 22, 2003).

At virtually the same time that the political branches worked to adapt the laws to a changing political and military situation, the U.S. Court of Appeals for the D.C. Circuit was issuing a series of important rulings addressing unanswered questions

as to the contours of 28 U.S.C. § 1605(a)(7). One of those decisions, *Ciccipio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), was issued shortly after the first status conference in this case. The court of appeals in *Ciccipio* resolved two questions of far-reaching significance in the FSIA context. It first held that § 1605(a)(7) confers subject-matter jurisdiction but "does not create a private right of action." *Id.* at 1034. A second key question related to the so-called Flatow Amendment, 28 U.S.C. § 1605 note, a provision passed in 1996 that allowed U.S. nationals injured or killed by acts of terrorism to seek money damages—including punitive damages—from officials or agents of foreign states designated as sponsors of terrorism. That provision, the court of appeals held, "creates a private right of action against officials, employees, and agents of foreign states," but this "cause of action is limited to claims against those officials in their *individual*, as opposed to their official, capacities." *Id.* In other words, the Flatow Amendment does not provide a cause of action against the foreign state itself. Because the plaintiffs in *Ciccipio* may have labored under the misconception that the Flatow Amendment provided just such a cause of action, the court of appeals remanded the case to give them "an opportunity to amend their complaint to state a cause of action under some other source of law, including state law." *Id.* at 1036.

In light of Presidential Determination No. 2003-23 and the D.C. Circuit's decision in *Ciccipio-Puleo*, this Court invited the United States to file a statement of interest expressing the government's position on subject-matter jurisdiction. Dkt. #4 (Order of

1/29/2004). The United States accepted the Court's invitation and submitted a brief in which it argued that the Presidential Determination, made pursuant to authority granted by Congress in the EWSAA, had restored Iraq's sovereign immunity effective immediately and that this Determination did not contain an exception (express or implied) for terrorism-related suits that had been filed prior to the passage of the EWSAA. *See* First Statement of Interest of the United States at 8, 12. To the extent that the Presidential Determination did not divest the Court of subject-matter jurisdiction, the United States maintained that plaintiffs' complaint suffered from the same defect as that of the plaintiffs in *Ciccipio-Puleo* and thus failed to state a claim, "at least as currently pled." *Id.* at 28.

Before this Court had the chance to evaluate the United States' main argument, the D.C. Circuit did so in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). The principal question in *Acree* was whether the language in § 1503 of the EWSAA authorized the President to make the state-sponsored terrorism exception to the FSIA inapplicable to Iraq. Answering that "exceedingly close question" in the negative, the *Acree* majority concluded that the phrase "any other provision of law that applies to countries that have supported terrorism," when read in context, "authorizes the President to make inapplicable to Iraq those provisions of law that impose economic sanctions on Iraq or that present legal obstacles to the provision of assistance to the Iraqi Government," but was "not intended to alter the jurisdiction of the federal courts under the FSIA". *Id.* at 51, 55. Section 1605(a)(7) of the FSIA,

the court held, was not a provision included within the Congressional grant of authority, and the President's exercise of power beyond that grant was thus without effect. *Id.* at 57. The court went on to conclude that the plaintiffs had nevertheless failed to state a claim upon which relief could be granted because, as in *Ciccipio-Puleo*, they had not "identif[ied] a particular cause of action arising out of a specific source of law." *Id.* at 59-60. Although agreeing with the majority that the plaintiffs' suit must be dismissed and that the statutory-construction issue presented a close question, then-Circuit Judge (now Chief Justice) Roberts would have accepted the United States' argument that § 1503 of the EWSAA granted the President authority to make 28 U.S.C. § 1605(a)(7) inapplicable to Iraq and that Presidential Determination 2003-23 "ousted the federal courts of jurisdiction in cases that relied on that exception to Iraq's sovereign immunity." *Id.* at 60, 62 (Roberts, J., concurring in part and concurring in the judgment). The United States, having secured on behalf of Iraq (which did not appear) dismissal of the plaintiffs' suit, did not seek further review of the statutory-interpretation issue before either the en banc D.C. Circuit or the U.S. Supreme Court.

Acree, along with the earlier decision in *Ciccipio-Puleo*, forced the parties to the present litigation to reassess their positions. Iraq entered an appearance through counsel. The United States submitted a second and, upon the Court's invitation, a third Statement of Interest. Plaintiffs filed a series of amended complaints designed to comply with *Ciccipio-Puleo*, culminating in a Third Amended Complaint. In the three-count complaint, plaintiffs

allege that they were aware of their fathers' captivity in Iraq, that they were able to see through media sources where their fathers were being held, and that they learned that their fathers were suffering mentally and emotionally. *See* Third Am. Comp. ¶ 22. Plaintiffs claim to have "endured severe mental anguish, depression, humiliation, anxiety, and pain and suffering as a direct result of their fathers' captivity." *Id.* at ¶ 21. They ground their prayer for money damages in three causes of action: intentional infliction of emotional distress under state common law (Count I), violations of customary international law incorporated into federal common law (Count II), and loss of solatium under federal common law (Count III). Plaintiffs contend that there are no disputed facts and that they are entitled to partial summary judgment. Iraq, backed in part by the United States, argues that plaintiffs' suit should be dismissed on jurisdictional and prudential grounds, or alternatively because plaintiffs have failed to state a valid claim. The parties ably advocated their positions at a motions hearing held on March 2, 2007, and their respective motions are now ripe for resolution.

STANDARDS OF REVIEW

Iraq seeks dismissal of plaintiffs' complaint on the grounds that it fails to state a claim upon which relief can be granted, that it presents a nonjusticiable political question, and that this Court lacks jurisdiction. The first of these three grounds constitutes a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, whereas the latter two challenge subject-matter jurisdiction and must be evaluated under Rule 12(b)(1). *See, e.g.*, *Gonzalez-Vera v. Kissinger*, 449 F.3d 1260, 1262 (D.C. Cir.

2006) (political-question doctrine goes to subject-matter jurisdiction). "[I]n passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see Leatherman v. Tarrant Cty. Narcotics and Coordination Unit*, 507 U.S. 163, 164 (1993); *Phillips v. Bureau of Prisons*, 591 F.2d 966, 968 (D.C. Cir. 1979). Therefore, the factual allegations must be presumed true, and plaintiffs must be given every favorable inference that may be drawn from the allegations of fact. *Scheuer*, 416 U.S. at 236; *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1113 (D.C. Cir. 2000). At the same time, courts need not accept as true "a legal conclusion couched as a factual allegation," nor inferences that are unsupported by the facts set out in the complaint. *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (quoting *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

Under Rule 12(b)(1), those seeking to invoke the jurisdiction of a federal court—plaintiffs here—bear the burden of establishing that the court has jurisdiction. *See US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20, 24 (D.C. Cir. 2000); *see also Grand Lodge of Fraternal Order of Police v. Ashcroft*, 185 F. Supp. 2d 9, 13 (D.D.C. 2001) (a court has an "affirmative obligation to ensure that it is acting within the scope of its jurisdictional authority"). "'[F]actual allegations in the complaint . . . will bear closer scrutiny in resolving a 12(b)(1) motion' than in resolving a 12(b)(6) motion for failure to state a claim." *Grand Lodge*, 185 F. Supp. 2d at 13-14 (quoting 5A Charles Alan Wright & Arthur R. Miller,

Federal Practice and Procedure § 1350 (2d ed. 1987)). A court may consider material other than the allegations of the complaint in determining whether it has jurisdiction, so long as it still accepts the factual allegations in the complaint as true. *See Jerome Stevens Pharmaceuticals, Inc. v. Food and Drug Admin.*, 402 F.3d 1249, 1253-54 (D.C. Cir. 2005). Additionally, "[w]here the motion to dismiss is based on a claim of foreign sovereign immunity, which provides protection from suit and not merely a defense to liability . . . the court must engage in sufficient pretrial factual and legal determinations to satisfy itself of its authority to hear the case before trial." *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027-28 (D.C. Cir. 1997) (citation and quotation marks omitted).

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure will not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987). All that the Federal Rules of Civil Procedure require of a complaint is that it contain "'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 346 (2005) (quoting *Conley*, 355 U.S. at 47). "Given the Federal Rules' simplified standard for pleading, '[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514

(2002) (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

Also pending is plaintiffs' motion for partial summary judgment. Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment bears the initial responsibility of demonstrating the absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The moving party may successfully support its motion by "informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Id.* (quoting Fed. R. Civ. P. 56(c)).

In determining whether there exists a genuine issue of material fact sufficient to preclude summary judgment, a court must regard the non-movant's statements as true and accept all evidence and make all inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A non-moving party, however, must establish more than the "mere existence of a scintilla of evidence" in support of its position. *Id.* at 252. By pointing to the absence of evidence proffered by the non-moving party, a moving party may succeed on summary judgment. *Celotex*, 477 U.S. at 322. "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (internal citations

omitted). Summary judgment is appropriate if the non-movant fails to offer "evidence on which the jury could reasonably find for the [non-movant]." *Id.* at 252.

DISCUSSION

In moving to dismiss plaintiffs' complaint, Iraq has a number of arrows in its quiver. It first argues, largely with reference to legal and political developments since the United States-led invasion in 2003, that adjudication of plaintiffs' claims "would compromise critical U.S. foreign policy objectives," and that the case must therefore be dismissed. *See* Def.'s Opp'n and Reply at 5. Should the Court decline to dismiss the case on jurisdictional or related prudential grounds, Iraq maintains that plaintiffs' suit should be dismissed on the alternative and independent basis that they have failed to state a claim under the state and federal causes of action invoked in their complaint. *See* Def.'s Memorandum in Support of Motion to Dismiss ("Def.'s Mem.") at 14-19; Def.'s Opp'n and Reply at 24-29. Emphasizing that none of Iraq's arguments turns on factual disputes, plaintiffs maintain that they are entitled to partial summary judgment under applicable precedents that establish (1) that this Court has jurisdiction over their claims, and (2) that they have stated valid claims under state and federal common law.

A. Jurisdictional and Prudential Grounds for Dismissal

The FSIA provides the exclusive basis for obtaining jurisdiction over foreign countries in United States courts. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Foreign states are "presumptively immune

from the jurisdiction of United States courts," which can assert jurisdiction only if one of the "specified exception[s]" to foreign sovereign immunity applies. *Id.* Plaintiffs in this case argue that jurisdiction lies under the statutory exception for state sponsors of terrorism. That exception divests foreign states of immunity from suits seeking money damages "for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act" where the perpetrator was "an official, employee, or agent of [the] foreign state [who was] acting within the scope of his or her office, employment or agency." 28 U.S.C. § 1605(a)(7). "In enacting this provision," the D.C. Circuit has explained, "Congress sought to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future." *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 88-89 (D.C. Cir. 2002).

Section 1605(a)(7) and its neighboring provisions specify which foreign states may be sued and under what circumstances. For one thing, jurisdiction under this section is available only for suits that seek money damages for injuries caused by certain enumerated types of conduct. The statute likewise instructs courts to locate the definitions for the types of qualifying conduct in specific sources. The phrase "hostage taking" at issue here, for example, is to be given the definition found in Article 1 of the International Convention Against the Taking of Hostages, *see* 28 U.S.C. § 1605(e)(2), which applies the term to "[a]ny person who seizes or detains and

threatens to kill, injure or continue to detain another person . . . in order to compel a third party . . . to do or abstain from doing any act as an explicit or implicit condition for release of the hostage." International Convention Against the Taking of Hostages, Dec. 17, 1979, art. 1, T.I.A.S. No. 11,081. Three additional conditions must be met before a party can obtain jurisdiction over a foreign state under the state-sponsored terrorism exception: (1) the foreign state must be one that was designated "as a state sponsor of terrorism . . . at the time the act occurred," (2) the foreign state must be afforded an opportunity to arbitrate claims based on acts that occurred in that state, and (3) the party or the victim must be a United States national. *See* 28 U.S.C. § 1605(a)(7)(A), (B); *see also Price*, 294 F.3d at 89; *Daliberti I*, 97 F. Supp. 2d at 44.

There is no dispute here that plaintiffs have satisfied these threshold conditions. (Indeed, Judge Friedman has already so ruled with respect to their parents. *See Daliberti I*, 97 F. Supp. 2d at 44-46.) Plaintiffs seek money damages arising from their fathers' detention and imprisonment at the hands of Iraqi officials. Such detention and imprisonment qualifies as "hostage taking" under these circumstances because Iraq used Beaty and Barloon as bargaining chips to extract concessions from the United States government. *See id.* at 46. At the time Iraq detained and held the men, it was designated as a state sponsor of terrorism. 55 Fed. Reg. 37,793 (Sept. 13, 1990); 31 C.F.R. § 596.201. Beaty and Barloon are United States nationals, as are their children, who attached an offer to arbitrate to their initial complaint in this case. Accordingly, plaintiffs have satisfied all of the prerequisites to obtaining

jurisdiction over a foreign state pursuant to the state-sponsored terrorism exception to the FSIA.

Iraq does not argue otherwise. It instead points to developments since the filing of the original complaint and to several legal doctrines that, it contends, counsel against adjudication of plaintiffs' suit. According to Iraq, dismissal is appropriate because (1) the President, acting pursuant to Congressional authorization, has restored Iraq's sovereign immunity for terrorist acts of the prior regime; (2) plaintiffs' suit presents a nonjusticiable political question; (3) adjudication is barred by the recently resuscitated doctrine of foreign-affairs preemption; and (4) resolving plaintiffs' claims would contravene the act-of-state doctrine. All of these interrelated arguments are variations on a common theme—that permitting plaintiffs to proceed with a lawsuit that could expose the fledgling Iraqi government to millions of dollars in liability runs counter to the foreign-policy interests of the United States and may place the Court in the uncomfortable position of resolving claims that the Executive Branch does not want resolved in this forum.

As the following discussion reveals, however, the Court's position is awkward not because adjudication of plaintiffs' relatively narrow claims portends grave international repercussions, but rather because Iraq seeks the same result—dismissal without reaching the merits—that the Court would be obliged to order had the D.C. Circuit adopted the position advanced by the United States, and accepted by then-Circuit Judge Roberts, in *Acree*. The *Acree* decision, as all sides acknowledged at the motions hearing, casts a long shadow over this case. It is therefore with that decision that the Court begins its analysis.

1. Restoration of Iraq's Sovereign Immunity

Iraq and the United States lead with an argument that both know is unavailing: that Presidential Determination 2003-23, which implemented the authority conferred by § 1503 of the EWSAA, restored in part Iraq's sovereign immunity by suspending the application of § 1605(a)(7) to Iraq. *See* Def.'s Opp'n and Reply at 10; Third Statement of Interest of the United States at 2. Both Iraq and the United States concede, as they must, that the D.C. Circuit in *Acree* rejected this very argument. 370 F.3d at 51; *id.* at 60-64 (Roberts, J., concurring in part and concurring in the judgment). The *Acree* majority acknowledged just how close the question was, but ultimately concluded that § 1503 of the EWSAA was only "aimed at legal provisions that present obstacles to assistance and funding for the new Iraqi Government and was not intended to alter the jurisdiction of the federal courts under the FSIA." *Id.* at 51. Judge Roberts, on the other hand, argued persuasively in his separate concurrence that the phrase "'[a]ny other provision' should be read to mean 'any other provision,' not, as the majority would have it, 'provisions that present obstacles to assistance and funding for the new Iraqi government.'" *Id.* at 60 (Roberts, J., concurring in part and concurring in the judgment). Under his interpretation of § 1503, the plain language of that statute authorized the President to make § 1605(a)(7) inapplicable to Iraq, and the Presidential Determination invoking that authority had "ousted the federal courts of jurisdiction" over suits brought under that exception. *Id.*

This Court believes that there is considerable force in the *Acree* concurring opinion, and would be

inclined to adopt that position if free to do so. Nonetheless, this Court remains bound by the *Acree* majority's interpretation of the EWSAA. Iraq recognizes as much and asks only that the Court "render a ruling on this jurisdictional issue . . . so that defendant may, if necessary, seek further review of it before the *en banc* D.C. Circuit or the Supreme Court." Def.'s Opp'n and Reply at 10. The Court will do just that, reiterating here that *Acree* forecloses the argument that the President has made 28 U.S.C. § 1605(a)(7) inapplicable to Iraq and thus partially restored Iraq's sovereign immunity.

2. Political-Question Doctrine

The political-question doctrine, which is "'primarily a function of the separation of powers,'" *Schneider v. Kissinger*, 412 F.3d 190, 193 (D.C. Cir. 2005) (quoting *Baker v. Carr*, 369 U.S. 186, 210 (1962)), "excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch." *Japan Whaling Ass'n v. American Cetacean Soc.*, 478 U.S. 221, 230 (1986). The touchstone for determining whether a case presents a nonjusticiable political question remains the nonexhaustive list of factors set forth by the Supreme Court in *Baker v. Carr*. *See Bancoult v. McNamara*, 445 F.3d 427, 432 (D.C. Cir. 2006). "Prominent on the surface of any case held to involve a political question," the Court explained,

> is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the

> impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. A court may dismiss a case as nonjusticiable if it finds any one of those six factors. *See Schneider*, 412 F.3d at 194. At the same time, courts may not shirk their responsibility of deciding live controversies properly before them "[u]nless one of these [six] formulations is inextricable from the case," a conclusion that should be reached only after a "discriminating inquiry into the precise facts and posture of the particular case." *See Baker*, 369 U.S. at 217; *Bancoult*, 445 F.3d at 432-33.

Cases implicating national-security concerns and foreign relations are among those most likely to present political questions. As the D.C. Circuit recently put it, these two topics "serve as the quintessential sources of political questions." *Bancoult*, 445 F.3d at 433. It is not surprising, therefore, that Iraq places a heavy emphasis on developments since the United States-led invasion of that country in 2003, including actions taken by the political branches. Armed with snippets from the Statements of Interest that the United States has filed in this matter, the text of an Executive Order

designed to protect Iraqi assets, figures as to the cost of reconstruction efforts, estimates placing Iraq's potential liability in U.S. courts in the hundreds of millions of dollars, and an obligatory citation to the number of American soldiers fighting there, Iraq insists that adjudication of plaintiffs' claims would unreasonably burden its recently installed government and thereby undermine critical U.S. foreign policy interests. *See* Def.'s Mem. at 20-25 & n.9; Def.'s Opp'n and Reply at 10-15. Such interference with foreign policy goals as articulated by the political branches, Iraq submits, renders this case nonjusticiable under the political-question doctrine.

But despite some broad statements linking the political-question doctrine to any issue that implicates United States foreign policy interests, the Supreme Court has made clear that not "every case or controversy which touches foreign relations lies beyond judicial cognizance." *See Baker*, 369 U.S. at 311; *Japan Whaling Ass'n*, 478 U.S. at 229-230; *see also Bancoult*, 445 F.3d at 435. The *Baker* Court itself listed six areas related to foreign affairs in which courts could resolve legal questions notwithstanding the primacy of the political branches. *See* 369 U.S. at 212-13. And in *Japan Whaling Ass'n*, the Court declined to dismiss on political-question grounds a lawsuit that sought to compel the Secretary of Commerce to declare Japan in violation of an international whaling agreement. 478 U.S. at 230. Decisions of the D.C. Circuit in the foreign-affairs area, of which there are many in recent years, likewise require a case-specific application of the *Baker* factors, with a focus "upon 'the particular question posed, in terms of the history

of its management by the political branches.'" *Hwang Geum Joo v. Japan*, 413 F.3d 45, 49 (D.C. Cir. 2005) (quoting *Baker*, 369 U.S. at 211). In its most recent application of the political-question doctrine, the court of appeals further emphasized that the focus must be on the "specific claims" at issue. *Omar v. Harvey*,—F.3d—, 2007 WL 420137, at *8 (D.C. Cir. Feb. 9, 2007). This focus conforms to the Supreme Court's oft-quoted reminder that the doctrine "is one of 'political questions,' not one of 'political cases.'" *Baker*, 369 U.S. at 217; *see also Omar*,—F.3d—, 2007 WL 420137, at *8 (citing *Baker* for this proposition). Hence, Iraq cannot secure dismissal on political-question grounds simply by invoking the foreign-affairs label; a closer examination of both the "specific claims" brought by plaintiffs and the issues alleged to constitute "political questions" is required.

That examination, conducted through the lens of the six sometimes-overlapping *Baker* factors, *see Alperin v. Vatican Bank*, 410 F.3d 532, 544 (9th Cir. 2005), reveals that plaintiffs' claims are "fully justiciable." *See Omar*,—F.3d—, 2007 WL 420137 at *9. To begin with, plaintiffs' claims are more narrow than some of Iraq's rhetoric suggests. Their claims do not bring into question the propriety of United States policy toward Iraq either at this moment or at the time plaintiffs' fathers were taken hostage by the former regime. Rather, the Third Amended Complaint seeks monetary damages, pursuant to a well-defined statutory scheme established by Congress and a developing body of case law in this district, for the emotional distress and loss of companionship that plaintiffs allegedly suffered when their fathers were detained and held as hostages over ten years ago. Moreover, the Court's

rulings below further limit the scope of this case to resolution of a single cause of action. On the surface, then, this case is similar to the numerous other suits against state sponsors of terrorism brought under § 1605(a)(7) and uniformly found to be justiciable.

The next task is to identify with precision the ways in which adjudicating plaintiffs' surviving claim might infringe on the constitutional prerogatives of the political branches. At the motions hearing, counsel for Iraq helpfully clarified the two "policy questions" that Iraq believes this case implicates and whose resolution supposedly belongs to the political branches, and to the Executive Branch in particular. First, Iraq insists that "the Constitution commits to the Executive, not the judiciary, the critical foreign policy determinations involved in promoting the reconstruction of Iraq and shielding a now friendly government from potentially crippling liability for acts of a predecessor dictatorship." Def.'s Opp'n and Reply at 11. In other words, it is up to the Executive to decide whether Iraq's new government should face hundreds of millions of dollars in liability for the transgressions of the prior regime. *See* Motions Hearing Prelim. Transcript ("Prelim. Tr.") at 27 (describing "the effect of damages liability" on the new Iraqi government as one of the two policy questions).

The second policy question is one that, although lurking in Iraq's filings, defense counsel articulated with precision for the first time at the motions hearing. Seizing on isolated passages from the United States' First Statement of Interest, and in particular on footnote 9 of that document, Iraq maintains that adjudicating this suit in federal court conflicts with the United States' longstanding foreign

policy of resolving the existing tort claims of its nationals via state-to-state negotiations with a formerly hostile, but now friendly, regime. Prelim. Tr. at 22-23, 27, 30. As for the footnote in question, it was written in the specific context of the potential effect of § 1503 of the EWSAA on pending claims and was appended to a paragraph that emphasized the "indisputable authority" of the political branches "to terminate claims that stand as an obstacle to achieving the Nation's foreign policy goals." First Statement of Interest at 16. The footnote clarifies that the statute and subsequent Presidential Declaration "have not extinguished plaintiffs' claims on the merits," even while insisting that the political branches could "plainly" have done so via a treaty or an Executive Agreement had they so desired. *Id.* at 16 n.9 (arguing that the actions of the political branches had the "effect . . . [of] preserv[ing] plaintiffs' claims . . . pending the establishment of a successor government capable of negotiating the diplomatic or other resolution of claims arising from the misdeeds of its predecessor").

Evaluating plaintiffs' specific claims in light of the two policy questions identified by Iraq, the Court finds "no independent reason why the claims presented . . . raise any warning flags as infringing on the prerogatives of the Executive Branch." *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1082 (9th Cir. 2006) (declining to dismiss under the political-question doctrine a suit by residents of Papa New Guinea against an international mining company). The first policy question centers on the possibility that a hefty damages award in this case and others similar to it could saddle the fledgling Iraqi government with an unmanageable debt. Iraq's

argument on this point, however, puts the cart before the horse, focusing on a possible outcome of plaintiffs' suit rather than on the actual process of adjudicating the one claim properly before the Court. Plaintiffs' lawsuit has the potential to implicate United States foreign policy only *if* Iraq is found liable and then only to the extent that monetary damages are assessed against it. In other words, plaintiffs' suit could *indirectly* affect the United States' ongoing efforts to stabilize the new Iraqi government only in so far as it seriously impacts the Iraqi fisc. But the D.C. Circuit has consistently stated—and recently reaffirmed—that "an indirect effect on foreign affairs [does] not automatically render a case nonjusticiable." *Bancoult*, 445 F.3d at 435 (citations omitted). The single claim that this Court would be adjudicating does not on its face present a political question, and can be viewed as implicating foreign affairs in only the "indirect" way that all damages actions under the FSIA do: by creating the potential for a significant judgment against a foreign state.

Adjudication of this suit also has little to do with Iraq's second asserted policy question—the wisdom and/or viability of state-to-state negotiations to resolve existing tort claims. Some three years after the United States filed its First Statement of Interest in this case, there remains no indication whatsoever that the Executive Branch has begun seeking via diplomatic means a remedy for these particular plaintiffs or those similarly situated to them. It is likewise unclear when and if Iraq will develop "a successor government capable of negotiating the diplomatic or other resolution of claims arising" from the Saddam Hussein regime.

See First Statement of Interest at 16 n.9. Events in Iraq change daily, and neither counsel for Iraq nor the United States has provided any assurances that the United States' three-year-old intention to resolve outstanding tort claims diplomatically has advanced beyond just that: an abstract intention. *See Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 380, 390-91 (3d Cir. 2006) (declining to dismiss on political-question grounds in part because there was no evidence "that the United States government is engaged in any form of diplomacy or negotiations" to resolve the issue at the heart of the plaintiffs' claims); *Alperin*, 410 F.3d at 549-50, 558 (emphasizing, in refusing to dismiss on political-question grounds claims against a foreign bank, that the plaintiffs' "lawsuit is the only game in town" and there were "[n]o ongoing government negotiations, agreements, or settlements . . . on the horizon"). Accepting this latest iteration of Iraq's political-question argument, in short, would require nothing less than a judicial act of faith—one that would leave the availability of a remedy for these plaintiffs to the vagaries of Iraq's internal struggles and the mere possibility that the Executive Branch will one day undertake negotiations that it has not initiated during the course of either this litigation or the consolidated cases pending before another member of this court. *See Vine v. Republic of Iraq*, Civ. A. Nos. 01-2674, 03-0691, 03-0888 (HHK). So long as the diplomatic solution hinted at by Iraq and the United States remains more fantasy than reality, there is no direct conflict between American foreign policy and adjudication of the particular claims at issue here. *See Gross*, 456 F.3d at 387 ("The mere existence of the Executive's power to extinguish claims . . . , without an exercise of that power, does not render

those claims nonjusticiable by virtue of being committed to a co-equal branch.").

A recent decision in the ongoing *Vine* litigation provides further support for rejecting Iraq's political-question argument. The plaintiffs in *Vine* are United States citizens who were allegedly detained, barred from leaving the country, and in some cases tortured, during Iraq's invasion of Kuwait in 1990. *See Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 14-15 (D.D.C. 2006). Iraq argued in *Vine* that "the question of its liability in these [consolidated] cases . . . presents a nonjusticiable political question, primarily because any decision to award plaintiffs compensation would undermine the efforts of the President and Congress to create a stable Iraq." *Id.* at 20 (citation and quotation marks omitted). Judge Kennedy rejected this argument. He first clarified that the plaintiffs' specific claims did "not require an evaluation of any executive or congressional policy decision or value judgment." *Id.* On the contrary, he explained, the cases "involve[d] the liability of a foreign sovereign under a well-defined statutory scheme—a statutory scheme that was enacted by both houses of Congress and signed by the President." *Id.* Finally, Judge Kennedy rejected the contention that the dramatic changes in the United States' policy toward Iraq justified dismissal. The language of § 1605(a)(7), he noted, conferred on the federal courts jurisdiction over claims against foreign states who were designated as sponsors of terrorism "at the time the [terrorist] act occurred," signaling Congress's intent to allow suits "against even those foreign nations whose sponsorship of terrorism ceases." *Id.*; *see also Kilburn v. Republic of Iraq*, 441 F. Supp. 2d 74, 78 (D.D.C. 2006) (concluding that Libya, despite a

Presidential Determination ending its status as a state sponsor of terrorism, was still amenable to suit under § 1605(a)(7)), *sum. aff'd*, 2006 U.S. App. LEXIS 26051 (D.C. Cir. Oct. 19, 2006); *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 27 n.27 (D.D.C. 2005) (noting that "Congress has chosen to condition an action under section 1605(a)(7) on whether the foreign state was a designated country at the time of the events at issue (and not at the time of the suit)"). The *Vine* court thus "decline[d] to 'convert what is essentially an ordinary tort suit into a nonjusticiable political question' merely because its claims 'arise in a politically charged context.'" 459 F. Supp. 2d at 20 (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 49 (2d Cir. 1991)).

Iraq assails the *Vine* decision as resting on the mistaken premise that the FSIA's express statutory grant of jurisdiction necessarily outweighs case-specific foreign-policy concerns that counsel against adjudication. Def.'s Opp'n and Reply at 13-14. It is certainly true, as Iraq contends, that the political-question doctrine applies in suits brought pursuant to the FSIA. *See, e.g., Hwang Geum Joo*, 413 F.3d at 48-49 (dismissing on political-question grounds a suit asserting jurisdiction under the FSIA's commercial-activity exception); *see also Baker*, 369 U.S. at 198 (describing the distinction between lack of subject-matter jurisdiction and nonjusticiability as "significant"). But Judge Kennedy did not rule otherwise in *Vine*. Rather, he reasoned that the indirect relationship between the plaintiffs' suit and United States foreign policy in Iraq could not offset the judgment of the political branches that a foreign nation may be sued in U.S. courts for its terrorist acts even if that nation had stopped sponsoring

terrorism by the time of the suit. *See* 459 F. Supp. 2d at 20. The cases cited by Iraq support its general point that the political-question doctrine applies in cases where jurisdiction lies under the FSIA. *See Whiteman v. Dorotheum GMBH & Co. KG*, 431 F.3d 57, 74 n.18 (2d Cir. 2005) (commercial-activity and expropriation exceptions to FSIA); *767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 162-63 (2d Cir. 2000) (commercial-activity exception); *Anderman v. Federal Republic of Austria*, 256 F. Supp. 2d 1098, 1111 (C.D. Cal. 2003) (commercial-activity and expropriation exceptions). But those cases, none of which addresses the state-sponsored terrorism exception, in no way undermine the *Vine* court's analysis, which draws from the text and structure of § 1605(a)(7) the reasonable inference that the political branches were both aware that suits would continue after regime changes and intended that such suits be permitted. In sum, the reasoning employed and conclusion reached in *Vine* are sound and apply with equal force here.

This Court's independent application of the six *Baker* factors leads it to the same conclusion that Judge Kennedy reached in *Vine*. The first *Baker* factor—whether there has been a "textually demonstrable constitutional commitment of the issue[s in the case] to a coordinate political department," 369 U.S. at 217—has been read as perhaps the most important of the six. *See Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004) (plurality opinion) (opining that the six factors "are probably listed in descending order of both importance and certainty"). Resolution of the narrow issues before the Court here has not been "constitutional[ly]

commit[ted]" to either of the other branches of government. As Judge Kennedy properly recognized in *Vine*, this Court need not *evaluate* "any executive or congressional policy decision or value judgment" in order to adjudicate plaintiffs' claims. 459 F. Supp. 2d at 20. What the Court must instead do is *implement* the "policy decision" and "value judgment" that the political branches made when they stripped state sponsors of terrorism of sovereign immunity for conduct that was likewise clearly defined in a statute passed by Congress and signed by President Clinton. *See* 28 U.S.C. § 1605(a)(7); *see also Ungar v. Palestine Liberation Org*, 402 F.3d 274, 280 & n.4 (1st Cir. 2005) (explaining that "[t]he very purpose" of both the FSIA and the Anti-Terrorism Act of 1991 was "to allow *the courts* to determine questions of sovereign immunity under a legal, as opposed to a political, regime") (emphasis added). Applying standards set forth in a duly enacted statute that represents the considered judgment of the political branches is a quintessential task undertaken by the federal courts. As the Second Circuit put it in another "politically charged" case that was at bottom "an ordinary tort suit," "[t]he department to whom this issue has been 'constitutionally committed' is none other than our own—the Judiciary." *Klinghoffer*, 937 F.2d at 49.

Iraq's argument to the contrary founders for two reasons: it loses sight of the narrow issues in this suit, and it attempts an end-run around the D.C. Circuit's decision in *Acree*. Iraq places heavy emphasis on the contention that the Constitution places decisions concerning the liability of a now-friendly regime for the acts of its predecessor in the hands of the Executive Branch and removes these

decisions from judicial cognizance. *See* Def.'s Opp'n and Reply at 11. While it is certainly true as a general matter that the Executive Branch is the first mover in the international arena, Iraq fails to explain how this Court would be making any critical foreign policy determinations simply by reaching the merits of plaintiffs' tort claims. Iraq's position once again confuses the United States' *general* interest in ensuring the new Iraqi government's financial stability with the nature of this Court's task in adjudicating the *specific* claims presented in this case. Put differently, Iraq focuses not on "political questions" that would have to be addressed in resolving plaintiffs' specific claims, but instead on the possibility that an eventual monetary judgment against it could undermine United States foreign policy. If what converts an otherwise justiciable suit into a nonjusticiable political question, however, is the mere possibility of a "crippling" monetary judgment against Iraq, then *all* suits against Iraq, including those under the FSIA's commercial-activity exception, would likewise have to be dismissed as presenting nonjusticiable political questions.

Counsel for Iraq argued otherwise at the motions hearing, insisting that a suit alleging tortious misdeeds brought pursuant to § 1605(a)(7) is different from a dispute of a commercial nature. If this were a contract case, counsel contended, the foreign-policy concerns would not be the same because the policy of the United States "has been not to negotiate contract claims on a state-to-state basis." Prelim. Tr. at 24. "But with regard to claims of tortious misconduct committed against its citizens during an era of hostilities," counsel added, "it has been the uniform policy [of the United States] to

negotiate those claims on a state-to-state basis." *Id.* This argument misses the mark for many of the reasons already articulated. First, there is no indication that the United States has ever acted on a policy of negotiating with the new Iraqi government tort claims arising from mistreatment of U.S. citizens by Saddam Hussein's regime. Second, Iraq overlooks the enactment of § 1605(a)(7), a federal statute that provides a judicial forum in which plaintiffs can assert claims arising from "tortious misconduct committed . . . during an era of hostilities." *See id.* The Court can therefore say, much as the First Circuit recently did in refusing to invoke the political-question doctrine, that this case "is a tort suit brought under a legislative scheme that Congress enacted for the express purpose of providing a [judicial forum] for injuries or death occasioned by acts of international terrorism" perpetrated by foreign states. *See Ungar*, 402 F.3d at 280; *see also Price*, 294 F.3d at 88-89 (explaining that Congress via § 1605(a)(7) "sought to create a judicial forum for compensating the victims of terrorism, and in so doing to punish foreign states who have committed or sponsored such acts and deter them from doing so in the future"). Iraq does not account for the distinct possibility that § 1605(a)(7) represents not just a barren jurisdictional provision, but also a conscious break from both traditional theories of foreign sovereign immunity and the "uniform policy" of state-to-state negotiations with now friendly regimes that Iraq believes the United States has long maintained. The Court declines to allow the aspiration that state-to-state negotiations will someday be possible to trump the clear expression of political will embodied in § 1605(a)(7).

Iraq also fails to account fully for the D.C. Circuit's ruling in *Acree*. Were this Court to dismiss plaintiffs' claims as nonjusticiable—ostensibly on the theory that the Executive has expressed the intent to terminate Iraq's exposure under § 1605(a)(7) and shield Iraqi assets from seizure—it would effectively be conferring on the Presidential Determination the precise legal effect that the D.C. Circuit has held it does not have. Counsel for Iraq acknowledged as much at the motions hearing. *See* Prelim. Tr. at 8-9 ("So the result that we are seeking is exactly the same result that a) counsel for the United States is urging and will urge in the future, and b) that the President took action to do."); *id.* at 9 (stating that Iraq's foreign-affairs arguments "are different means of reaching that result"). To be sure, the Court would not be expressly ruling that the Presidential Determination, in combination with the EWSAA, divests it of subject-matter jurisdiction. But the result, and to some extent the rationale, would be virtually indistinguishable: that the Executive's view on the wisdom of shielding Iraq from liability under the state-sponsored terrorism exception requires dismissal of plaintiffs' claims before reaching the merits. *Cf. Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. __, Slip. Op. at 7 (2007) ("Dismissal short of reaching the merits means that the court will not 'proceed at all' to an adjudication of the cause."). Accepting Iraq's argument on this point, then, would grant Iraq the very relief that it was denied in *Acree*. And that would likely be true in this case as well as all others brought against Iraq under § 1605(a)(7), since all such cases implicate the same two foreign-policy concerns—the potential for "crippling" monetary judgments and interference with state-to-state negotiations. The Court is

reluctant to dismiss plaintiffs' suit on the basis of an argument that smacks of an attempt to end-run *Acree* and that would render the court of appeals' decision in that case effectively a nullity.

Having concluded that the first and most important *Baker* factor does not support dismissal, the Court will now address the remaining factors more rapidly. The second factor—the absence of "judicially discoverable and manageable standards," *see* 369 U.S. at 217—is no hurdle to adjudication of plaintiffs' suit. Plaintiffs' surviving claim will be resolved by applying the firmly established requirements of a federal statute (the FSIA) and the principles that courts in this district have developed for resolving claims under the FSIA's state-sponsored terrorism exception. To the extent that plaintiffs' surviving claim sounds in state tort law, the Court will apply eminently "manageable standards" in the form of state common law, which "provides clear and well-settled rules on which [the Court] can easily rely." *Klinghoffer*, 937 F.2d at 49.

The third and fifth *Baker* factors are likewise inapposite. "Adjudicating [the] discrete issues" raised by plaintiffs' suit "will not require the [C]ourt to make pronouncements on foreign policy," *Alperin*, 410 F.3d at 555, which the Court recognizes is something best left to the political branches. Plaintiffs' suit can be resolved without this Court making "an initial policy determination of a kind clearly for nonjudicial discretion," *Baker*, 369 U.S. at 217, because in adjudicating this suit, the Court will be honoring precisely the "policy determination" that "nonjudicial" (i.e., political) officials made when they enacted 28 U.S.C. § 1605(a)(7). Indeed, the enactment of § 1605(a)(7), no less that the

Presidential Determination on which Iraq places so much weight, is a "political decision already made" to which the Court must "adhere" in this case. *See Baker*, 369 U.S. at 217; *see also Owens*, 374 F. Supp. 2d at 28 (acknowledging that the issue of "whether suit should be allowed against [a foreign state] is certainly one that touches on the relationship between the United States and other nations, a concern that is primarily committed to the discretion of Congress and the President," but declining to apply the political-question doctrine because the political branches had spoken through § 1605(a)(7) and by designating the defendant nation a state sponsor of terrorism). The President's actions with respect to Iraq, and in particular Determination 2003-23, are of course other "political decisions" implicated by this and all other lawsuits against Iraq under § 1605(a)(7). But the Court simply cannot accord the same weight to an Executive action that the D.C. Circuit has declared without legal effect as it gives to an unambiguous statute reflecting the political branches' intent that lawsuits of this ilk be resolved in the federal courts. Hence, the third and fifth *Baker* factors both militate in favor of adjudicating plaintiffs' suit.

Analysis of the fourth *Baker* factor—"the impossibility of a court's undertaking independent resolution without expressing lack of the respect due the coordinate branches," *see* 369 U.S. at 217—requires a more extended discussion. Central to this analysis are the two substantive Statements of Interest that the United States has filed in this case. *See Whiteman*, 431 F.3d at 72 n.17 ("In applying th[e] fourth *Baker* test, courts have been particularly attentive to the views of the United States

Government about the consequences of proceeding with litigation."); *Alperin*, 410 F.3d at 556 (noting that the views of the State Department, had it "expressed a view, . . . would certainly weigh in evaluating th[e] fourth *Baker* formulation"). Pointing to recent cases in which the Supreme Court and the courts of appeals have adopted a policy of case-specific deference to the views of the Executive Branch, Iraq maintains that such deference is warranted here and that the Court should honor the United States' view that dismissal of plaintiffs' suit is appropriate. *See* Def.'s Opp'n and Reply at 6-9 n.5, 12 (citing, among others, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004), and *Republic of Austria v. Altmann*, 541 U.S. 677, 702 (2004)). The Supreme Court in *Altmann*, a FSIA case, acknowledged that the State Department could "fil[e] statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity," and hinted that such statements "might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy." 541 U.S. at 701-702. In *Sosa*, the Court cited *Altmann* with approval in suggesting that courts employ "a policy of case-specific deference to the political branches" where adjudication in United States courts threatens to undermine American foreign policy. 542 U.S. at 733 n.21. But because such "case-specific deference" was unnecessary to resolve the issues in both *Altmann* and *Sosa*, the Supreme Court did not flesh out the level of deference owed or indicate just what submissions of the Executive Branch were entitled to heightened deference.

This Court does not have such a luxury in the present case, and will have to decide whether the Statements of Interest filed by the Department of Justice are entitled to the substantial weight that Iraq places on them. Having carefully reviewed both Statements and the relevant post-*Altmann/Sosa* precedents, the Court concludes that the Statements cannot be read to support a finding of nonjusticiability. Two primary considerations inform the Court's conclusion: (1) the precise content of the Statements of Interest, including the purpose for which and context in which they were filed; and (2) the Department of Justice's declination, despite the opportunity to do so, to take a position on the questions of justiciability that Iraq has raised in seeking dismissal. The United States' Statements of Interests cover a limited subject matter and were filed for a limited purpose. Furthermore, the deference due a statement filed by the Executive Branch *does* hinge in large part on the thoroughness of the statement and of the representations made therein, including whether the Executive supports dismissal of the suit and on what grounds. *See, e.g., Presbyterian Church of Sudan v. Talisman Energy, Inc.*, Civ. A. No. 01-9882, 2005 WL 2082846, at *3 (S.D.N.Y. Aug. 30, 2005) ("Courts have assigned varying weight to statements of interest by the United States Government according to the circumstances."). The Court is thus entitled to—and will—place significant weight on the Executive Branch's refusal to support dismissal of this suit specifically on political-question grounds.

Turning first to the content and purpose of the Statements of Interest, counsel for the United States reiterated at the motions hearing what was already

clear from the government's filings: that the United States entered this case primarily "to defend [a] specific act of the President" and "to bring [a] threshold jurisdictional issue to the Court's attention" at a time when Iraq had not yet appeared in the case. Prelim. Tr. at 59-60; *see* Third Statement of Interest at 1 (explaining that the United States filed a statement pursuant to 28 U.S.C. § 517 because of its interests in restoring Iraq's sovereign immunity and in enforcing federal laws). It is not surprising, then, that its Statements of Interest advocate dismissal *exclusively* on the theory rejected by the D.C. Circuit in *Acree*: that Presidential Determination 2003-23 and the EWSAA divested this Court of subject-matter jurisdiction. The United States' first Statement of Interest, filed on March 15, 2004, elaborated on essentially three points: (1) that the Presidential Determination, made pursuant to section 1503 of the EWSAA, had rendered the state-sponsored terrorism exception inapplicable to Iraq effective immediately; (2) that the district court's assertion of jurisdiction in *Acree v. Republic of Iraq*, 276 F. Supp. 2d 95 (D.D.C. 2003), had been in error; and (3) that, even if the Court rejected the United States' jurisdictional argument, plaintiffs had failed to state a claim under *Ciccipio-Puleo*. Nowhere in its Statement did the United States contend that plaintiffs' claims were nonjusticiable or that their suit would have presented an irreconcilable conflict with American foreign policy even in the absence of the Presidential Determination and the EWSAA. In short, the United States' Statement of Interest did not say, "here are the foreign policy reasons why the Executive Branch is worried about continued adjudication of this specific case"; it said something closer to, "here are the foreign-policy reasons why

the President and Congress took a series of actions in 2003."

Recognizing as much, Iraq plucks various sentences out of context in an effort to emphasize the extent to which lawsuits against it could, as a general matter, "significantly interfere with the establishment of a new, peaceful government." Def.'s Opp'n and Reply at 7 (quoting First Statement of Interest at 13). But these and other statements cited by Iraq cannot be unmoored from that specific context, one in which the United States was simply attempting to explain why giving "immediate effect [to] Section 1503 and the Presidential Determination is entirely consistent with the[] underlying foreign policy objectives" of the political branches. First Statement of Interest at 10. The United States' description of those "foreign policy objectives" cannot be read as an *implicit* request by either the Executive Branch generally or the State Department specifically that the Court decline to exercise jurisdiction *in this case*. But without precisely such an indication of how this particular case—as opposed to a class of suits—could substantially interfere with the United States' foreign-policy interests, the Court cannot invoke the "case-specific" deference suggested by *Sosa* and *Altmann*. *See Altmann*, 541 U.S. at 702 ("[S]hould the State Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.") (emphasis in original); *see also Presbyterian Church of Sudan*, 2005 WL 2082846, at *6 (reading *Altmann* and *Sosa* as establishing that "deference is

appropriate to the extent that a sovereign's opinion has been stated with particularity").

If there were any doubt about the contours of the Executive Branch's position, that doubt would be dispelled by the United States' Third Statement of Interest, in which it *explicitly* declined to take a position on the political-question, foreign-affairs-preemption, and act-of-state arguments that Iraq has raised in its most recent filings. This recent Statement of Interest, weighing in at less than three pages, reasserts the government's position that, notwithstanding the D.C. Circuit's decision in *Acree*, "the combined legislative and executive action that rendered Section 1605(a)(7) of the FSIA inapplicable to Iraq" divests this Court of jurisdiction. Third Statement of Interest at 2. In the remaining sentences, the United States "also reiterates the crucial foreign policy interests underlying those political actions," identifying "the promotion of a peaceful, stable, and democratic Iraq [as] a fundamental goal of U.S. foreign policy," and pointing to the President's view that judicial process against Iraq threatens that policy. *Id.* at 3. As Iraq itself recognizes, however, the United States expressly declined to take a position on "any other issues raised by the parties," *id.*—a category that includes Iraq's arguments that this suit should be dismissed as nonjusticiable, preempted, or barred by the act-of-state doctrine. That silence, particularly in light of foreign-policy interests that are supposedly "crucial," is significant.

Counsel for Iraq has gamely attempted to downplay the significance of the United States' refusal to advocate dismissal on foreign-policy grounds. *See* Prelim. Tr. at 31, 64-65. Iraq is

certainly correct that courts normally defer to the Executive Branch's exposition of its foreign-policy interests, not to its legal conclusions. *See, e.g., Altmann*, 541 U.S. at 701-02; *Sarei*, 456 F.3d at 1080 n.8. On the other hand, Iraq misconceives the distinction drawn in *Altmann* and other cases between the foreign-policy views of the Executive Branch and the Executive's "legal conclusions." *Altmann* itself is instructive in this regard. There, the Supreme Court rejected the "recommendation" of the Executive Branch that the FSIA not be applied to conduct that pre-dated the statute's enactment. 541 U.S. at 701. In so ruling, the Court explained that the view of the United States on "a pure question of statutory interpretation" was "of considerable interest," but did not deserve the same kind of "special deference" to which the view of the State Department "on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct" might be entitled. *Id.* at 701-02 (citing *Immigration & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446, 448 (1987)). The *Altmann* Court thus reaffirmed that no "special deference" is owed the Executive's views on a pure question of law, but neither said nor hinted that it is improper for courts to focus on whether the foreign-policy concerns that prompt the Executive Branch to express its views are strong enough to lead the Executive also to seek dismissal of the suit.

Various pre- and post-*Altmann* decisions confirm that courts are much more likely to dismiss a case based on the Executive Branch's assertion of important foreign-policy interests when the Executive actually advocates for dismissal on that basis. Recent decisions by the Third and Ninth

Circuits have found the refusal of the Executive Branch to seek dismissal, when it had the opportunity to do so, significant if not dispositive. *See Sarei*, 456 F.3d at 1080-82; *Gross*, 456 F.3d at 385. *Gross* was one in a line of cases in which victims (or heirs of victims) of atrocities during the Nazi era sued German companies for labor abuses, appropriation of private property, and refusal to pay insurance policies. *Id.* at 366. The specific issue before the Third Circuit was whether the district court had erred in dismissing as nonjusticiable a suit seeking interest payments on money paid by German companies to a foundation that had been established to compensate the victims. In dismissing the suit, the district court relied on two letters from the Executive Branch: an undated letter from Deputy Secretary of State Richard Armitage to a German official on the foundation's board of trustees, and a letter submitted to the court by a Department of Justice trial attorney. *Id.* at 372-74. While the Armitage letter expressed the view that the dispute was better resolved diplomatically than judicially, it did not take a position on the merits of the dispute. *Id.* at 373. The Justice Department's letter, the only one filed with the federal courts, was even more barebones, remaining silent on the issue of justiciability and expressly disclaiming a position on the merits. *Id.* at 374.

The Third Circuit concluded that the suit did not present a nonjusticiable political question. Central to that conclusion was the court's ruling that neither letter was entitled to case specific deference. 456 F.3d at 384. The court of appeals emphasized that the Armitage letter had not been directed to a United States court, that it made "no promises to seek

dismissal or that the United States Executive would intervene," and that it took no position on the merits of the plaintiffs' lawsuit. *Id.* The second letter fared no better. It was, the court noted, "from a Department of Justice trial attorney and not from a State Department official." *Id.* Furthermore, that attorney "was silent on the position of the United States as to justiciability and the proper forum in which to resolve the dispute." *Id.* The two letters revealed only that "the United States ha[d] declined to express to the District Court or [the court of appeals] a position on the justiciability or merits of the 'interest' dispute, except its lack of a position." *Id.* at 385. And because the United States had failed to do so, the court concluded that the "Executive [Branch] has not, through an expression of its interest in the case, committed the 'interest' dispute to a political branch." *Id.*

The Ninth Circuit's decision in *Sarei*, issued just days after *Gross* and later cited with approval by the D.C. Circuit, *see Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354-55 (D.C. Cir. 2007), is to the same effect. In *Sarei*, the court of appeals reversed a district court decision that had dismissed on political-question grounds a suit filed by former residents of Papa New Guinea under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The State Department had filed a Statement of Interest that, while declining to take positions on the political-question and act-of-state issues raised by the defendant, expressed the United States' view that adjudication threatened "very grave" consequences for American foreign policy. 456 F.3d at 1075-76. Although according "serious weight" to the Statement of Interest," the Ninth Circuit held that the filing did not establish any of the final three

Baker factors. *Id.* at 1082. Of particular significance to the court was the fact that "[t]he State Department explicitly did *not* request that [it] dismiss this suit on political question grounds." *Id.*; *cf. Presbyterian Church of Sudan*, 2005 WL 2082846, at *6 (refusing to dismiss an ATS suit under the political-question doctrine, and finding significant the brevity of the Executive Branch's filing because the State Department "has not hesitated to warn courts where it believes continuation of a lawsuit will affect a foreign government's policy to the extent that it would disturb U.S. relations with that foreign government"). "[W]e are confident," the *Sarei* court explained, "that proceeding does not express any disrespect for the executive, even if it would prefer that the suit disappear." 456 F.3d at 1082.

Although it has not definitively decided the issue, the D.C. Circuit has also recently indicated that it too believes that the level of deference due a Statement of Interest turns on whether the Executive Branch merely voices foreign-policy concerns or instead directly requests that a suit be dismissed as nonjusticiable. *See Doe*, 473 F.3d at 354. One of the questions in *Doe* was whether Exxon Mobil could obtain mandamus relief on the ground that the district court had "clearly and indisputably exceeded its jurisdiction by refusing to dismiss th[e] case under the political question doctrine." *Id.* at 349, 353 (citations, quotation marks, and alterations omitted). Exxon argued that the district court had erred by declining to defer to a letter in which the State Department's Legal Advisor expressed concerns about the suit's impact on relations between the United States and Indonesia. The D.C. Circuit rejected "Exxon's contention that there is a

conflict between the views of the State Department and those of the district court." *Id.* at 354. Pointing to language in the letter that revealed the tentative nature of the State Department's views, the court read the letter "not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution to the district court alerting it to the State Department's concerns." *Id.* Because "the State Department did not necessarily expect the district court to immediately dismiss the case in its entirety," the court reasoned, there was no need to "decide what level of deference would be owed to a letter from the State Department that *unambiguously* requests that the district court dismiss a case as a non-justiciable political question." *Id.* The D.C. Circuit thus signaled its view that there is in fact a difference between the "level of deference" owed an Executive Branch filing "that *unambiguously* requests" dismissal under the political-question doctrine and a filing that merely alerts a court to the possibility that a pending suit, depending on its scope and outcome, could affect American foreign-policy interests somewhere down the road.

This reading of *Doe*, *Gross*, and *Sarei* is consistent with the reasoning of and results in the cases cited by Iraq. Indeed, the cases cited by Iraq illustrate the corollary to the principle explained in the preceding paragraphs--namely, that courts are especially likely to defer to an Executive Branch explanation of foreign-policy interests when that explanation comes in the form of a filing seeking dismissal on foreign-policy grounds. Thus, the Second Circuit in *Whiteman v. Dorotheum GMBH & Co. KG*, 431 F.3d 57, 63 (2d Cir. 2005), dismissed under the political question doctrine a suit that the United States

described as the final case preventing an Executive Agreement with Austria from taking effect. There, however, the supplemental Statement of Interest jointly filed by the Departments of State and Justice explicitly averred that it was "in the foreign policy interests of the United States for this action to be dismissed on *any valid legal ground*." *Id.* (quoting U.S. Supplemental Letter at 6) (emphasis added). The letter went on to note a recent decision in which the Eleventh Circuit had dismissed a similar suit under the doctrine of international comity, and implored the Second Circuit to give deference to the articulated foreign-policy interests in considering dismissal under any of "several abstention doctrines" or any other "legal arguments advanced by the defendants in seeking dismissal." U.S. Supplemental Letter at 6, 8. Another Second Circuit decision cited by Iraq, *767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152, 160 (2d Cir. 2000), fits the same pattern. In affirming the district court's dismissal of a suit involving the by-then-dissolved Republic of Yugoslavia, the Second Circuit relied in part on an amicus brief in which the United States had specifically invoked the political-question doctrine in seeking outright dismissal of the case. *See id.*; *see also* Brief for Amicus Curiae United States of America Supporting Appellees, *767 Third Ave. Assoc. v. Consulate General of Socialist Federal Republic of Yugoslavia*, 218 F.3d 152 (2d Cir. 2000) (99-9011).

The most relevant example of this trend is the primary D.C. Circuit authority upon which Iraq relies—the decision in *Hwang Geum Joo*, 413 F.3d at 48-52. There, the court of appeals dismissed on political-question grounds a suit by women who

claimed that they had been raped and tortured by Japanese soldiers during World War II. A central issue was whether treaties that Japan had signed with the women's countries of origin had preserved or extinguished the claims of those countries' citizens against Japan. *Id.* at 48. Relying on "a thorough and persuasive Statement of Interest" submitted by the United States, *id.*, the court held that resolution of this issue was a political question because "adjudication by a domestic court not only 'would undo' a settled foreign policy of state-to-state negotiation with Japan, but could also disrupt Japan's 'delicate' relations with China and Korea." *Id.* at 52 (quoting United States' Statement of Interest at 34-35).

Because the case was remanded by the Supreme Court for further consideration in light of *Altmann*, the United States actually submitted two amicus briefs during the course of the *Hwang Geum Joo* appeal. Both briefs argued that the plaintiffs' claims were nonjusticiable, the earlier one doing so as an alternative argument and the latter advancing that argument expressly and from the outset. *See* Brief for Amicus Curiae the United States of America at 28-29, *Hwang Geum Joo v. Japan*, 332 F.3d 679 (D.C. Cir. 2003) (No. 01-7169); Supplemental Brief on Remand for Amicus Curiae the United States of America at 9, 11-12, *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005) (No. 01-7169). The Supplemental Brief emphasized what the United States believed to be "the broader question before the [D.C. Circuit]: whether a foreign policy determination that wartime claims against Japan should not be entertained in U.S. courts renders such claims nonjusticiable." *Id.* at 11. Under "similar

circumstances," the United States argued successfully, "courts have consistently held that dismissal is appropriate on political question, international comity, or other doctrinal grounds." *Id.* at 12; *see also id.* at 9 (citing the Supreme Court's decision in *Baker v. Carr* for the proposition that "courts should not second-guess" the Executive's foreign-policy determinations). In *Hwang Geum Joo*, as in the other key cases cited by Iraq, the court deferred to the foreign-policy judgment of the Executive Branch in a setting where the Executive had explicitly sought dismissal on justiciability grounds.

A rather simple proposition emerges from this lengthy background: under the fourth *Baker* factor, the level of deference owed a statement of interest filed by the Executive Branch depends on, among other factors, what the statement actually says; who (i.e., which Executive agency) submitted it; and, perhaps most critically, whether the United States supports dismissal on the basis of the political-question doctrine or other related grounds. As applied here, these criteria lead inexorably to the conclusion that this case is justiciable. With respect to content and context, the Statements of Interest never stray from the Justice Department's limited purposes of defending an action by the President and alerting the Court to what was at that time an open and potentially dispositive jurisdictional question. The passages on which Iraq seizes explain the foreign-policy motives of the political branches—especially the President—but do not purport to set forth the views of the State Department as to whether and why adjudicating this *particular* case would threaten U.S. foreign policy. *See Altmann*, 541

U.S. at 702. Indeed, the fact that the Statements of Interest were filed by the Justice Department, rather than the State Department, serves both to reinforce the limited purposes for which they were submitted and to rebut Iraq's efforts to convert isolated sentences into authoritative declarations of the Executive's views on the foreign-affairs implications of this case. *See Gross*, 456 F.3d at 384.

Finally, as Iraq concedes, the Statements of Interest expressly decline to take a position on whether this suit presents a nonjusticiable political question. The United States has taken a position on only one of the arguments advanced by Iraq, but has declined, despite the Court's invitation, to endorse the view that plaintiffs' suit is nonjusticiable. Neither the United States' refusal to take a position nor its comments in explaining a no longer viable theory of dismissal mandate the heightened "case-specific" deference that the D.C. Circuit in *Hwang Geum Joo* accorded the Executive Branch's unequivocal and detailed request that the case be deemed nonjusticiable, 413 F.3d at 48, or that the Second Circuit in *Whiteman* accorded the Executive's view that the last remaining obstacle to enforcement of an Executive Agreement should be dismissed "on any valid legal ground," 431 F.3d at 63. This case is instead analogous in all material ways to *Gross* and *Sarei*, where the Third and Ninth Circuits declined to dismiss the respective suits on political-question grounds despite treating the United States' expressions of interest with respect. The same conclusion follows here, where this Court has likewise carefully reviewed and extensively considered the views set forth by the United States in both Statements of Interest and at the motions

hearing. But because the United States has not indicated—and the Court finds no independent reason to conclude—that adjudicating plaintiffs' claims would "express[] lack of the respect due the coordinate branches," dismissal under the political-question doctrine on the basis of the fourth *Baker* factor is inappropriate. *See* 369 U.S. at 217.

This leaves the sixth *Baker* factor and brings the Court back to where this analysis began: the D.C. Circuit's decision in *Acree*. The sixth *Baker* factor gauges the potential for "embarrassment from multifarious pronouncements by various departments on one question." *See* 369 U.S. at 217. There is little doubt that this case implicates that factor. Congress and the President spoke with one voice in 1996 when they stripped state sponsors of terrorism of immunity for certain terrorist acts. A strong argument has been made—both by the United States and by then-Circuit Judge Roberts in *Acree*—that the political branches once again spoke with one voice in seeking to remove Iraq from that disreputable list in 2003. But the D.C. Circuit has held otherwise, and absent en banc or Supreme Court consideration, or a Congressional response to *Acree*, *every* case brought against Iraq under § 1605(a)(7) will present the same cacophony of actions and arguments: an unambiguous statute that provides a judicial forum for victims of terrorism to seek redress for the wrongs they suffered, the President's attempt to restore Iraq's sovereign immunity pursuant to a statute that he believed equally clear, and the court of appeals' ruling that Congress did not give the President the power to throw this suit and similar ones out of the judicial forum that had been created in 1996. In other words,

to the extent that there exists a potential for "embarrassment," that potential stems from the D.C. Circuit's holding that the EWSAA did not give the President the authority that he thinks Congress gave him, *not* from this Court's adjudication, almost three years after *Acree* was decided, of the narrow claims advanced by plaintiffs here. Accordingly, the final *Baker* factor, although surely implicated, does not weigh in favor of dismissing plaintiffs' suit.

3. Foreign-affairs preemption

Iraq next asks the Court to dismiss plaintiffs' claims on the strength of "the doctrine of foreign affairs preemption," which it says "rests on many of the same considerations underlying the political question doctrine." Def.'s Opp'n and Reply at 15. The basis for this argument is the Supreme Court's decision in *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003). That case involved California's Holocaust Victim Insurance Relief Act ("HVIRA"), a state law that required insurers doing business in California to disclose information about holocaust-era insurance policies. *Id.* at 409. HVIRA also created a private cause of action and extended the statute of limitations for individuals to assert claims "based on acts perpetrated in the Holocaust." *Id.* The primary question before the Supreme Court was whether the state statute was preempted because it conflicted with the federal government's elaborate efforts in the international arena to resolve disputes over the insurance claims of Holocaust survivors.

Answering that question in the affirmative, the Court relied heavily on its decision in *Zschernig v. Miller*, 389 U.S. 429, 432 (1968), in which an Oregon probate statute prohibiting inheritance by a nonresident alien was invalidated as an "intrusion

by the State into the field of foreign affairs which the Constitution entrusts to the President and the Congress." The *Garamendi* majority acknowledged that the lead opinion in *Zschernig* could be read as standing for the proposition "that state action with more than an incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict." 539 U.S. at 418. But Justice Harlan's separate opinion in *Zschernig* had declined to go so far, instead endorsing the view that, absent federal action, "the States may legislate in areas of their traditional competence even though their statutes may have an incidental effect on foreign relations." 389 U.S. at 459 (Harlan, J., concurring in the result). The *Garamendi* Court deemed it unnecessary, however, to choose between the broader reading of *Zschernig* and Justice Harlan's more narrow view. 539 U.S. at 419-20 & n.11 (describing the two positions as "complementary," and noting that where states act in their areas of traditional competence, "it might make good sense to require a conflict, of a clarity and substantiality that would vary with the strength or the traditional importance of the state concern asserted"). This was because the state statute was preempted even under Justice Harlan's view, since it generated a "clear conflict" with the Executive Branch's efforts to settle claims in the international arena, and the state's interests "in regulating disclosure of European Holocaust-era insurance policies" were relatively weak. *See id.* at 421-25. The California statute, the Supreme Court explained, used "an iron fist where the President has consistently chosen kid gloves," *id.* at 427, and thus was likely to "produce something more than

incidental effect in conflict with express foreign policy of the National Government," *id.* at 420.

Iraq's reliance on *Garamendi* is flawed for at least two reasons. First and foremost, there is a serious question as to whether *Garamendi*'s "conflict" analysis even applies to a case such as this one, where it is a *federal statute* that establishes the exclusive framework for suing a foreign sovereign and that contemplates that state law will provide the rule of decision. See 28 U.S.C. § 1606 ("[T]he foreign state shall be liable to the same manner and to the same extent as a private individual under like circumstances."); *Bodoff v. Islamic Republic of Iran*, 424 F. Supp. 2d 74, 83 (D.D.C. 2006) (describing § 1606 as "a 'pass-through' to substantive causes of action against private individuals that may exist in federal, state or international law." (citation omitted)). The Supreme Court has recognized in construing the FSIA that the statute permits—and indeed may require—application of state law in suits against foreign sovereigns. *See First Nat. City Bank v. Banco Para el Comercio*, 462 U.S. 611, 622 n.11 (1983) ("[W]here state law provides a rule of liability governing private individuals, the FSIA requires the application of that rule to foreign states in like circumstances."); *cf. Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 491 (1983) (holding that the FSIA did not violate Article III of the Constitution "by granting federal courts subject-matter jurisdiction over certain civil actions . . . against foreign sovereigns where the rule of decision may be provided by state law"). Iraq has cited no cases, and the Court is aware of none, in which a federal court has applied the foreign-affairs-preemption doctrine recognized in *Garamendi* and *Zschernig* to a suit

brought pursuant to the FSIA. The sole post-*Garamendi* authority cited by Iraq involved claims against two *American* corporations, such that the FSIA did not apply. *See Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1185-88 (C.D. Cal. 2005) (dismissing under the foreign-affairs-preemption doctrine the plaintiffs' state tort law claims). There is good reason for this absence of on-point authority: it makes little sense to describe a state law as "clearly conflicting" with the federal government's foreign policy when a law enacted by the federal government is what allows plaintiffs to invoke, and instructs federal courts to enforce, state law causes of action.

Second, even assuming that the "conflict" framework applies, there are numerous and critical distinctions between the present case and *Garamendi*. For one thing, at issue in *Garamendi* was the validity of a state legislative enactment specifically intended to reach sensitive foreign-policy matters. Here, conversely, the only state "action" implicated is the Florida and Oklahoma common law of tort; the existence of such court-created common law evinces no effort on the part of either of those state governments to weigh in on knotty issues of international consequence. *Cf. Garamendi*, 539 U.S. at 439 (Ginsburg, J., dissenting) ("The notion of 'dormant foreign affairs preemption' with which *Zschernig* is associated resonates most audibly when a state action reflects a state policy critical of foreign governments and involves sitting in judgment of them." (citation, quotation marks, and alterations omitted)); *Doe v. Exxon Mobil Corp.*, Civ. A. No. 01-1357, 2006 WL 516744, at *3 (D.D.C. March 3, 2006) (finding *Garamendi* "simply not applicable" because

"no state government has passed any statute in conflict with U.S. foreign policy"), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007). Iraq downplays the difference between affirmative state legislative action and the application of state common law, insisting that, "[a]s with other preemption doctrines, the doctrine of foreign affairs preemption applies equally to state statutes and state common law causes of action." Def.'s Opp'n and Reply at 16 n.8. Maybe so. But what this argument overlooks is that the common law of tort is plainly an area of "traditional" state competence. Under *Garamendi*, Iraq must identify a "conflict [] of a clarity or substantiality that [varies] with the strength or the traditional importance of the state concern asserted." 539 U.S. at 419 n.11; *see also id.* at 427 ("The question relevant to preemption in this case is conflict."). And because the concerns underlying the tort of intentional infliction of emotional distress are "legitimate" and "substantial," *see Farmer v. United Brotherhood of Carpenters & Joiners*, 430 U.S. 290, 302-03 (1977), Iraq must demonstrate a similarly "substantial" conflict between the state tort laws and U.S. foreign policy.

This Iraq cannot do. There is simply no appreciable conflict between applying state tort law via § 1606 of the FSIA and American foreign policy as articulated by the federal government. As was explained in the political-question analysis above, allowing plaintiffs' suit to proceed cannot unduly interfere with country-to-country negotiations that are at this point more of an aspiration than a policy. *See Gross*, 456 F.3d at 380, 390-91; *Alperin*, 410 F.3d at 558. Furthermore, even if the application of state law leads to a judgment against Iraq, the only effect that this

particular case will have is on the Iraqi government's finances. And if such an effect is enough to establish a "clear conflict" with American foreign policy, then *all* suits against Iraq under the FSIA in which state law provides the rule of decision—or at a minimum, all suits brought under § 1605(a)(7)—would also be preempted. Nothing in the *Garamendi* majority's narrow opinion indicated an intent to mandate such a strange result or to upset settled principles of law in the FSIA context. *See First Nat. City Bank*, 462 U.S. at 622 n.11 (acknowledging that state law can and at times must provide the rule of decision via §1606 of the FSIA).

Finally, the present case is quite simply miles away from *Garamendi* on the facts. There have not been, as in *Garamendi*, extensive efforts to resolve claims by former hostages in the international arena. *Cf. Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 236-38 (D.C. Cir. 2003) (holding that plaintiffs' FSIA suit was barred by an Executive Agreement that precluded claims by former hostages against Iran); *Ibrahim v. Titan Corp.*, 391 F. Supp. 2d 10, 16 (D.D.C. 2005) (declining to dismiss a suit on political-question grounds where, "unlike in many other reparations cases entangled with political questions, there is no state-negotiated reparations agreement competing for legitimacy with this court's rulings"). The *possibility* of such extensive efforts at some indeterminate future date is no substitute for the *actual* diplomatic solution toward which the Executive had worked in *Garamendi*.

Moreover, to the extent that the application of state common law could be viewed as conflicting with the United States' general interest in stabilizing Iraq, Florida and Oklahoma's interest in seeing their

generally applicable tort laws applied to protect their residents is substantial enough to offset such a conflict. The Supreme Court has recognized the strength and legitimacy of the state interests involved in holding that a state-law cause of action for intentional infliction of emotional distress was not preempted by the federal labor laws. *See Farmer*, 430 U.S. at 302-03. In so ruling, the Court repeatedly pointed to the state's "legitimate" and "substantial interest" in protecting its citizens "from emotional distress caused by outrageous conduct," an interest tied to the states' more general interest "in protecting the health and well-being of its citizens." *See id.* at 302, 304. The tenuous nature of the conflict (if there even is one), along with the strength of the state interests implicated, distinguishes this case from *Garamendi* and suggests that preemption under the foreign-affairs doctrine is inappropriate.

4. Act-of-state doctrine

Iraq's final foreign-affairs salvo is the act-of-state doctrine. That doctrine bars courts from adjudicating a case "when 'the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within' its boundaries." *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1164 (D.C. Cir. 2002) (quoting *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990)). "[M]ost recently described . . . as a consequence of domestic separation of powers, reflecting the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder the conduct of foreign affairs," *id.* at 1165 (citations and quotation marks omitted), the act-of-

state doctrine "provides foreign states with a substantive defense on the merits." *Altmann*, 541 U.S. at 700. "The policies underlying the doctrine include international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *World Wide Minerals*, 296 F.3d at 1165 (citations and quotation marks omitted). When the factual predicate for the doctrine's application exists, courts decide whether to invoke it by assessing three factors: (1) the degree of consensus concerning a particular area of international law, (2) the implications of the issue for the United States' foreign relations, and (3) whether the government that perpetrated the act or acts at issue is still in existence. *See Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 26 (D.D.C. 2005).

There is no question here that "the factual predicate for application of the act of state doctrine" exists, *W.S. Kirkpatrick*, 493 U.S. at 405, since plaintiffs' claims center on the propriety of the Iraqi government's detention and imprisonment of Beaty and Barloon within Iraqi territory. *See Underhill v. Hernandez*, 168 U.S. 250, 254 (1897) (dismissing under the act-of-state doctrine suit in which the plaintiff alleged that he had been unlawfully detained and assaulted by revolutionary forces that the United States later recognized as Venezuela's government). Hence, the principal issue is "whether the purpose of the act of state doctrine would be furthered by its application in this case." *W.S. Kirkpatrick*, 493 U.S. at 405; *see Sarei*, 456 F.3d at 1084. In addressing that issue, Iraq properly recognizes that both this Court in *Owens* and Judge

Friedman in *Daliberti I* expressed great skepticism about applying the act-of-state doctrine to suits brought under the FSIA's state-sponsored terrorism exception. *See Owens*, 374 F. Supp. 2d at 26-27; *Daliberti v. Republic of Iraq*, 97 F. Supp. 2d 38, 54-55 (D.D.C. 2000). This hesitance is rooted in the fact that the political branches enacted a statute whose text and structure expressly contemplate holding a foreign state liable for terrorist acts committed years earlier, and that this statute does not come into play unless the Executive Branch had identified a nation as a sponsor of terrorism at the time of the acts at issue. *See Owens*, 374 F. Supp. 2d at 27; *Daliberti I*, 97 F. Supp. 2d at 55. Under such circumstances, it is difficult if not impossible to say that the judiciary would be unduly interfering with the political branches' conduct of foreign policy, which is the principal concern underlying the act-of-state doctrine. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1965); *W.S. Kirkpatrick*, 493 U.S. at 404.

These justifications for refusing to invoke the act-of-state doctrine in *Daliberti I* and *Owens* apply fully here. Indeed, because the actions underlying plaintiffs' claims are the same ones already litigated in *Daliberti I*, Iraq must demonstrate that something is different here. The critical difference, it says, is that the regime that perpetrated the acts underlying plaintiffs' claims is no longer in power, and has been replaced with a new government whose stability and success are a major foreign-policy objective of the United States. *See* Def.'s Opp'n and Reply at 23-24 (quoting *Sabbatino*, 376 U.S. at 428 ("The balance of relevant considerations may also be shifted if the government which perpetrated the challenged act of

state is no longer in existence . . . , for the political interest of this country may, as a result, be measurably altered.")); *see also Owens*, 374 F. Supp. 2d at 26 (listing "whether the government that perpetrated the challenged act is still in existence" as one consideration for applying the act-of-state doctrine). Although the existence of a new government is certainly significant, the Court is not convinced that this single distinction either (1) offsets the *Daliberti I* court's reasoning that dismissal "would constitute more of a judicial interference in the announced foreign policy of the political branches of government than to allow the suit to proceed under the explicit authorization of Congress," 97 F. Supp. 2d at 55; or (2) suffices to justify dismissing a lawsuit that was filed *before* the regime change and that is based on the same underlying conduct as was *Daliberti*.

This is especially so given the lack of case-specific action on the part of the very political branches whose "announced foreign policy" the courts attempt to respect. *See id.* The Executive Branch, despite the President's publicly expressed desire to shield Iraq from liability, has declined to raise the act-of-state doctrine in its Statements of Interest and has explicitly declined to support Iraq's invocation of the doctrine. The out-of-context snippets from those Statements reproduced by Iraq hardly constitute the "considered judgment" or "opinion" of the State Department "on the implications of exercising jurisdiction over *particular* [foreign states] in connection with *their* alleged conduct." *See Altmann*, 541 U.S. at 702; *see also id.* at 714 (Breyer, J., concurring) (emphasizing that the United States could file statements of interest that refer "not only

to sovereign immunity, but also to other grounds for dismissal, such as . . . the nonjusticiable nature . . . of the matters at issue") (citations omitted). If the regime change were an event so cataclysmic as to mandate a result here contrary to the one in *Daliberti*, one would expect the Executive Branch, especially when given the chance, to say so explicitly.

To be sure, Iraq is correct that dismissal on act-of-state grounds may be appropriate regardless of the position taken by the Executive Branch. The Supreme Court has so suggested, *see Sabbatino*, 376 U.S. at 436, and other courts have gone so far as to raise the act-of-state doctrine on their own either in a default proceeding or when resolution of a case on the merits might embarrass the United States government. *See Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1992); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1290 (N.D. Cal. 2004). But those situations are easily distinguishable from this case. *Sabbatino* itself is a poor analogue because, by the time the case reached the Supreme Court, the Executive Branch had cleared up the ambiguity in its earlier statements by expressly seeking dismissal on act-of-state grounds. *See* 376 U.S. at 420; Brief for United States as Amicus Curiae, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1963) (No. 16), reprinted in 2 I.L.M. 1009 (1963). Furthermore, as was explained at length above, adjudicating the particular claims in this case is unlikely to cause excessive—if any—embarrassment to the United States government. If such embarrassment were indeed a risk, the Court would certainly have expected the Executive Branch to so indicate when given the chance to do so. Finally, the additional caution that may be called for in a default proceeding is not warranted here, where

Iraq is represented by able counsel. The Court therefore declines, as it did in *Owens*, to dismiss on act-of-state grounds "an action that entails no greater consideration of the acts of a foreign state than any other claim under section 1605(a)(7)." 374 F. Supp. 2d at 28.

B. Failure to State a Claim

Having concluded that plaintiffs' suit need not be dismissed on jurisdictional or prudential grounds, the Court will now take up Iraq's argument that plaintiffs have failed to state a claim upon which relief can be granted. Iraq contends that Counts II and III of plaintiffs' Third Amended Complaint must be dismissed because federal common law does not furnish a cause of action in cases under the state-sponsored terrorism exception, a conclusion that this Court already reached in *Dammarell v. Islamic Republic of Iran*, Civ. A. No. 01-2224, 2005 WL 756090, at *23 (D.D.C. March 29, 2005) ("*Dammarell II*") ("[F]ederal common law should not serve as a rule of decision in the run of section 1605(a)(7) cases."). At the same time, Iraq asks the Court to reconsider its holding in *Dammarell II* that state common law can supply a cause of action in suits brought pursuant to § 1605(a)(7). Because both parties focus on this Court's decision in *Dammarell II*, a brief review of that decision, and the reasoning underlying the Court's conclusions, is warranted.

1. The continuing validity of Dammarell II

This Court in *Dammarell II* endeavored to answer one of the principal questions left open by the D.C. Circuit's decisions in *Ciccipio-Puleo* and *Acree*: what "particular causes of action . . . may be brought against a foreign state in a case proceeding under

section 1605(a)(7)." 2005 WL 756090, at *11. After a thorough "examination of the plain text, the structure, and the legislative history of sections 1605(a)(7) and 1606, and a comparison to the analogous statutory scheme of the [Federal Tort Claims Act]," the Court concluded that "the causes of action that may be brought against the foreign state . . . include any claims that can be brought against a private individual in like circumstances"—to wit, claims arising under "state common and statutory law, federal statutory law, and even the law of a foreign state." *Id.* at *14. Conspicuously absent from the sources of law held to supply cognizable causes of actions was federal common law. The starting point for the Court's conclusion in that regard was the D.C. Circuit's then-recent decision in *Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003). The court of appeals in *Bettis*, this Court explained, had "cautioned against the creation of a federal common law remedy" in the context of the state-sponsored terrorism exception. 2005 WL 756090, at *23. Indeed, the *Bettis* court interpreted § 1606 as "in effect instruct[ing] federal judges to find the relevant law, not to make it." 315 F.3d at 333. This Court then reviewed other potential justifications for fashioning federal common law—predictability and uniformity in an area of law, the existence of interests that are uniquely federal in nature, possible conflicts between state law and federal interests, and the Supreme Court's recognition of an extremely narrow class of federal-common-law claims in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004)—and determined that none of those justifications overcame the textual and structural mandate of the statute or the general rule against

creating federal common law. *See* 2005 WL 756090, at *28.

As the parties recognize, *Dammarell II* both buoys and undermines critical aspects of their respective positions. Iraq points out that the Court's ruling with respect to federal common law spells trouble for two of the three counts in plaintiffs' complaint. On the other hand, the Court's conclusion that state common law can provide a cause of action in cases brought pursuant to § 1605(a)(7) disposes of a principal ground on which Iraq seeks dismissal of Count I and shifts the focus to whether plaintiffs have stated a valid claim for intentional infliction of emotional distress under Florida and Oklahoma law. Hence, the question is whether either the arguments advanced by Iraq or jurisprudential developments in the last two years call into doubt the soundness of this Court's reasoning and conclusions in *Dammarell II*.

The Court answers that question in the negative. Two primary considerations guide this answer. For one thing, Iraq's arguments substantially mirror ones that the Court has already considered and rejected. In other words, Iraq's plea to reevaluate *Dammarell II* is based not on new information, extant jurisprudence or policy arguments that the Court overlooked, or even intervening case law, but instead on a simple disagreement with the conclusions that this Court reached. Such disagreement, without more, does not support revisiting a well reasoned decision that has been widely followed. Indeed, it is precisely the wide acceptance by other judges in this district that provides a second reason for reaffirming the validity of *Dammarell II*. In a series of cases brought under §

1605(a)(7), other members of this district court have adopted this Court's reasoning, often explicitly, in concluding both that state law can provide a cause of action and that federal common law cannot. *See, e.g., Blais v. Islamic Republic of Iran*, 459 F. Supp. 2d 40, 54 (D.D.C. 2006) (RCL); *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10, 25-26 (D.D.C. 2006) (HHK); *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53, 60 (D.D.C. 2006) (RMU); *Holland v. Islamic Republic of Iran*, Civ. A. No. 01-1924, 2005 U.S. Dist. LEXIS 40254, at *33-*56 (D.D.C. Oct. 31, 2005) (CKK). This Court's decision in *Dammarell II* thus represents the prevailing view of judges in this district on at least two critical questions left unanswered by the D.C. Circuit's opinions in *Ciccipio-Puleo* and *Acree*. Until the D.C. Circuit or the Supreme Court rules otherwise, this Court will adhere to the conclusions reached and the reasoning set forth in *Dammarell II*. Accordingly, Iraq's request to revisit that decision is rejected.

2. Dammarell II requires dismissal of Counts II and III

As was intimated above, Counts II and III of plaintiffs' Third Amended Complaint fail under *Dammarell II*. Count II purports to state a claim for "violations of customary international law incorporated into federal common law," while Count III asserts a federal-common-law claim for loss of solatium. *See* Third Am. Comp. at ¶¶ 32-40. Because federal common law cannot "serve as a rule of decision in . . . section 1605(a)(7) cases," both of these counts fail to state a claim upon which relief can be granted and must therefore be dismissed. *See Dammarell II*, 2005 WL 756090, at *23; *see also Vine*, 459 F. Supp. 2d at 27; *Pugh v. Socialist People's*

Libyan Arab Jamahiriya, Civ. A. No. 02-2026, 2006 WL 2384915, at *12-*14 (D.D.C. May 11, 2006); *Holland*, 2005 U.S. Dist. LEXIS 40254, at *48-*56. Count III also fails to state a claim on the alternative ground that "[s]olatium . . . is not an independent cause of action, but rather is a form of damages." *See Reed*, 439 F. Supp. 2d at 67-68 (citing *Salazar v. Islamic Republic of Iran*, 370 F. Supp. 2d 105, 115 (D.D.C. 2005) (interpreting Illinois law)). As such, "[a] defendant cannot be liable for solatium but can be liable for solatium damages through other causes of action." *Id.* at 68 (citing *Salazar*, 370 F. Supp. 2d at 115).

In the face of these authorities, plaintiffs cling to two other cases from this district: *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107, 113 (D.D.C. 2000), and *Dodge v. Islamic Republic of Iran*, Civ. A. No. 03-0252, 2004 U.S. Dist. LEXIS 29045, at *11-*14 & n.8 (D.D.C. Aug. 25, 2004). Neither of these decisions suffices to salvage Counts II and III. *Anderson* was decided long before the D.C. Circuit dramatically altered the jurisprudence in this area of the law in *Ciccipio-Puleo* and *Acree*, and consequently includes almost no discussion of the complex issues raised by those cases. To the extent that the *Anderson* court's reliance on federal common law is inconsistent with *Dammarell II*, this Court declines to follow *Anderson*. Furthermore, although it was decided after *Ciccipio-Puleo*, the *Dodge* case merely asserts without explanation that plaintiffs who bring suit under § 1605(a)(7) "may sue [a foreign] state under any cause of action arising from common law, foreign law, or federal statute which might ordinarily give rise only to individual liability." 2004 U.S. Dist. LEXIS 29045, at *12. As

two other judges in this district have found, that statement is overbroad and fails to give full effect to the holdings of *Ciccipio-Puleo* and *Acree*. *See Vine*, 459 F. Supp. 2d at 26 n.17; *Holland*, 2005 U.S. Dist. LEXIS 40254, at *40-*41. The *Dodge* decision therefore lacks persuasive value and need not be followed. For these reasons, the Court will grant in part Iraq's motion to dismiss and will dismiss Counts II and III of plaintiffs' Third Amended Complaint.

3. *Count I states a claim upon which relief can be granted*

Count I of plaintiffs' Third Amended Complaint seeks recovery for intentional infliction of emotional distress (hereinafter "IIED") under state common law. As Iraq recognizes, this Court in *Dammarell II* determined that the state law providing the rule of decision is generally the domicile of the plaintiffs at the time of the tortious conduct. *See* 2005 WL 756090, at *21; *see also Blais*, 459 F. Supp. 2d at 54 (same). Here, the parties appear to agree that the principles of state common law that govern are those of Florida (for the Barloon plaintiffs) and Oklahoma (for the Beaty plaintiffs). The parties share other common ground as well, acknowledging (1) that the highest courts of both Florida and Oklahoma have accepted the tort of intentional infliction of emotional distress, and (2) that those courts have adopted the definition of and limitations on that tort set forth in the Restatement (Second) of Torts § 46. Their agreement, however, ends there. Iraq contends that both states strictly enforce the Restatement's so-called "presence" requirement, and that because plaintiffs were not physically present when their fathers were taken and held as hostages and possibly tortured, they cannot recover for any emotional

distress that they may have suffered. *See* Restatement (Second) of Torts § 46(2)(a) ("Where such [extreme and outrageous] conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm."). Plaintiffs respond that the Restatement itself contemplates some exceptions to the presence requirement, *see id. Comment l*, and point to FSIA cases in this district in which this Court and other judges have relaxed that requirement either explicitly or implicitly.

Indeed, although the parties have framed the decisive issue in terms of the Restatement's "presence" requirement, courts in this district have permitted the close relatives of the victims of terrorist bombings to recover under an IIED cause of action without discussing the presence requirement. *See Dammarell v. Islamic Republic of Iran*, 404 F. Supp. 2d 261, 283, 285-86 (D.D.C. 2005) ("*Dammarell IV*"); *Salazar*, 370 F. Supp. 2d at 115 n.12 (citing *Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86, 107 (D.D.C. 2003), and *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 35 (D.D.C. 2001)); *Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27, 50 (D.D.C. 2001). These decisions have endorsed the proposition that terrorist attacks such as bombing an embassy or holding someone hostage for an extended period are by their nature intended to harm not just those injured or killed at the time, but also the families of the injured. *Dammarell IV*, 404 F. Supp. 2d at 283; *Salazar*, 370 F. Supp. 2d at 115 n.12. In treating close relatives of victims as themselves direct victims

of the terrorist attacks, the courts have unmistakably (but only *implicitly*) applied § 46(1) of the Restatement, which governs direct victims and which has no presence requirement. The reasoning that supports treating absent relatives as direct victims is identical to the reasoning that supports relaxing the presence requirement. Accordingly, the Court will focus, as the parties do, on the presence requirement, at the same time explaining why Count I of plaintiffs' Third Amended Complaint states an IIED claim upon which relief can be granted under either form of analysis.

The parameters of the state-law inquiry are well settled. This Court is bound by the highest state court's construction of state law. *See Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam) ("[T]he views of the State's highest court with respect to state law are binding on the federal courts."). Where the state courts have not addressed a question crucial to the resolution of a case before it, however, a federal court must answer that question as it believes the highest court of the state would. *See Guideone Elite Ins. Co. v. Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1326 n.5 (11th Cir. 2005) (noting that in the absence of binding precedent, the court's "objective [wa]s to determine issues of state law as [it] believe[d] the Florida Supreme Court would"); *Gibson v. Arnold*, 288 F.3d 1242, 1246 (10th Cir. 2002) (explaining that where issue of Oklahoma law had not been resolved by state courts, the federal court "must predict how the Supreme Court of Oklahoma would rule"). The Court is faced with just such an unresolved question of state law in this case—namely, whether the highest courts of Florida and Oklahoma would recognize a

cause of action for intentional infliction of emotional distress where plaintiffs who were minors at the time seek to recover for the severe anguish that they allegedly suffered when their fathers were detained and held as hostages in a foreign country.

In answering this question, the Court is free to "consider whatever might lend it insight, including relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand." *See Guideone Elite Ins. Co.*, 420 F.3d at 1326 n.5 (citation and quotations marks omitted); *accord Gibson*, 288 F.3d at 1246 (noting that the court could "consider all resources available, including decisions of [Oklahoma] courts, other state courts and federal courts, in addition to the general weight and trend of authority") (citation and quotation marks omitted) (alteration in original). These sources, and in particular previous decisions by this Court and other judges in this district, strongly suggest that Florida and Oklahoma courts would recognize an IIED cause of action under the circumstances of this case, whether by treating these plaintiffs as direct victims or by dispensing with the presence requirement.

Starting with Florida, that state's Supreme Court first recognized the IIED tort in *Metropolitan Life Ins. Co. v. McCarson*, 467 So.2d 277, 278 (Fla. 1985). The *McCarson* Court adopted the definition of the tort set forth in § 46 of the Restatement (Second) of Torts. Plaintiffs seeking to recover for IIED must establish the following four elements: (1) deliberate or reckless infliction of mental suffering, (2) outrageous conduct, (3) that the conduct caused the emotional distress, and (4) that the distress is severe.

See Williams v. City of Minneola, 575 So.2d 683, 691 (Fla. 5th Dist. Ct. App. 1991) (citation omitted); *see also Dammarell IV*, 404 F. Supp. 2d at 285. Iraq does not dispute that the allegations in the Third Amended Complaint, construed in the light most favorable to plaintiffs, suffice to establish each of these four elements. Rather, Iraq argues that "Florida courts have consistently hued to Section 46's requirement of physical presence and held that plaintiffs who are not present during an immediate relative's mistreatment do not state a claim for IIED." Def.'s Mem. at 16.

The Fifth District Court of Appeal's decision in *Williams*, however, belies that contention. As this Court has previously explained, the *Williams* court held "that a plaintiff could maintain an action for IIED based on the outrageous display of pictures of the dead body of a spouse, child, sibling, or parent, regardless of whether the plaintiff witnessed the outrageous conduct." *Dammarell IV*, 404 F. Supp. 2d at 285. That decision thus "tacitly acknowledged that some forms of outrageous behavior, though directed in the most immediate sense at one person, can be directed at others who are not present." *Id.*; *cf. Hatch v. Davis*, 147 P.3d 383, 388 (Utah 2006) (reasoning that the exception to the presence requirement "reflects the law's recognition that certain conduct not committed in one's presence can nevertheless be so injurious to an individual, despite the fact that he is not present to witness it, that our societal values would be offended were we not to provide a remedy at law."). Iraq insists that *Williams*, along with the decision in *Armstrong v. H & C Communications*, 575 So.2d 280, 282 (Fla. 5th Dist. Ct. App. 1991), should be read in the context of

"the 'unique considerations' Florida law applies to cases involving dead bodies." Def.'s Opp'n and Reply at 29 (quoting *Williams*, 575 So.2d at 694). But as Iraq concedes, this Court has declined to read *Williams* so narrowly, concluding that the Florida Supreme Court would recognize an IIED claim by a close relative of a terrorist-bombing victim even if the relative was not present at the bombing. *See Dammarell IV*, 404 F. Supp. 2d at 285; *see also Salazar*, 370 F. Supp. 2d at 115 n.12 (reaching the same conclusion under Illinois law and noting that "[c]ourts have uniformly held that a terrorist attack—by its nature—is directed not only at the victims but also at the victims' families"). Whether understood as an expansive interpretation of who the direct victims of outrageous conduct are or as a decision to dispense with the presence requirement in certain cases, *Williams* refutes Iraq's argument that Florida appellate courts would undoubtedly hold that "plaintiffs who are not present during an immediate relative's mistreatment do not state a claim for IIED." Def.'s Mem. at 16. Hence, the bounds of the IIED tort in Florida, at least as this Court has construed the relevant state decisions, are not nearly as limited as Iraq maintains.

The question then becomes whether the Florida courts would hold that the conduct alleged here—the hostage-taking and mistreatment of plaintiffs' fathers—also gives rise to a claim for IIED by close relatives not present at the time of the outrageous acts. A number of cases in this district pre-dating *Ciccipio-Puleo* suggest that the answer to this question is "yes." The first of these decisions is *Sutherland*, 151 F. Supp. 2d at 49-50. That case involved an American university professor who had

been kidnapped and held hostage in Lebanon for over six years. *Id.* at 31-37. Sutherland sued Iran for its role in the kidnapping, and his wife and three daughters brought claims for loss of consortium, intentional infliction of emotional distress, and loss of solatium. *Id.* at 45. Operating in the pre-*Ciccipio-Puleo* landscape, the *Sutherland* court applied a form of federal common law to the plaintiffs' claims, and accordingly evaluated the IIED claims brought by Sutherland and his wife under the Restatement § 46 standards. *Id.* at 47, 49. The court had "little hesitation in finding" that Sutherland had suffered severe emotional distress, that Iran had engaged in outrageous conduct, and that such conduct had caused Sutherland's emotional distress. *Id.* at 49. Whether that same conduct gave rise to a claim for Sutherland's wife was a closer question. Nevertheless, the court concluded that Iran had indeed caused Sutherland's wife emotional distress, either intentionally or recklessly:

> The Court finds that, when an organization takes someone hostage, it is implicitly intending to cause emotional distress among the members of that hostage's immediate family . . . . [A]n organization taking someone hostage implicitly believes that such emotional distress is substantially certain to result. These conclusions are based on the logical inference that a hostage without loved ones—that is, a hostage without those who will be emotionally distressed by his absence—is of no value at all to a hostagetaker. For without loved ones, there is nobody to pay for the hostage's release. And even if the hostage's country (rather than his family) pays for his

> release, a hostage's loved ones play a vital role in agitating for governmental action.

Id. at 50.

Although the *Sutherland* court neither mentioned the presence requirement nor distinguished between claims by direct victims under § 46(1) and those by third-parties under § 46(2), the same judge confronted the presence issue in another hostage-taking case decided just a few months later. *See Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001), *aff'd sub nom. Bettis v. Islamic Republic of Iran*, 315 F.3d 325 (D.C. Cir. 2003). The issue in *Jenco* was whether the siblings, nieces, and nephews of another former hostage could recover for the emotional distress that their relative's captivity had allegedly caused them. *See* 154 F. Supp. 2d at 35. Referencing its analysis in *Sutherland*, the *Jenco* court explained that the Restatement imposed two requirements that relatives must satisfy before recovering for intentional infliction of emotional distress: they must qualify as close relatives, and they must normally be present at the time of the defendant's outrageous conduct. The *Jenco* court recognized that, in allowing Sutherland's wife to recover, it had carved out an exception to the presence requirement and thus "parted somewhat from the Restatement." *Id.* at 36. But the court had done so, it explained, "because the defendants' intent to distress her was quite implicit in the nature of the defendants' conduct." *Id.* Applying this same logic, the court determined that the *Jenco* plaintiffs who qualified as close relatives—the victim's siblings—could likewise recover even though they had not been present during their brother's detention and captivity. *Id.* That conclusion, the court reasoned,

was in accord "with the analysis of the leading and most recent tort treatise," which agreed that the presence requirement should not apply where "the defendants' conduct is sufficiently outrageous and intended to inflict severe emotional harm upon a person wh[o] is not present." *Id.* (quoting Dan B. Dobbs, *The Law of Torts* § 307, at 834 (2000)).

There is little reason to believe—and Iraq certainly has not provided any—that the Florida Supreme Court would reject the analysis employed in *Sutherland* and *Jenco* and would instead strictly enforce the presence requirement in a hostage-taking case such as this one. Were that court to do so, it would be rejecting an analysis and conclusion that other courts in this district have found persuasive and have followed. *See, e.g., Burnett v. Al Baraka Inv. and Dev. Corp.*, 274 F. Supp. 2d 86, 108 (D.D.C. 2003); *Campuzano v. Islamic Republic of Iran*, 281 F. Supp. 2d 258, 271 (D.D.C. 2003). Furthermore, even if the Florida courts were reluctant to analyze plaintiffs' claim under § 46(2) of the Restatement, Iraq has failed to present any justification for distinguishing this case from either *Dammarell IV*, where this Court concluded that the Florida Supreme Court would treat the close relatives of terrorist-bombing victims as direct victims of the outrageous conduct, *see* 404 F. Supp. 2d at 285, or from *Salazar*, where this Court allowed the daughter of a terrorist-bombing victim to recover even though she was not present at the time of the attack, *see* 370 F. Supp. 2d at 115 & n.12. Whether plaintiffs are viewed as direct victims of Iraq's outrageous conduct under Restatement § 46(1) or as third-party victims under Restatement § 46(2), therefore, this Court concludes that the Florida courts would hold that

plaintiffs' allegations state a cognizable claim for IIED.

For all of the reasons given in *Sutherland* and *Jenco*, moreover, the emotional distress suffered by the close relatives of hostages depends even less upon those relatives' presence at the scene of the tortious conduct than in an attack on a foreign embassy. The relatives' emotional distress rests in the fact that they cannot see or speak to the person taken hostage; that is, they suffer because they cannot be in their loved one's "presence." Hence, the very *raison d'etre* of the presence requirement—to draw a line limiting the cause of action to those persons who have "genuine[ly]" been harmed, *see* Restatement § 46, Comment l—evaporates when the underlying conduct is specifically intended to harm those who are not present. A recent state supreme court decision recognizing exceptions to the presence requirement makes just this point. *See Hatch*, 147 P.3d at 388. The *Hatch* court set forth three factors that factfinders may consider in deciding "whether conduct triggers" an exception to the presence element of an IIED claim: (1) the relationship of the target of the conduct to the plaintiff; (2) the relationship between the person committing the conduct and the plaintiff; and (3) the egregiousness of the conduct. *Id.* To these three factors the court added a fourth that an absent plaintiff *must* show—"that the conduct was undertaken, in whole or in part, with the intention of inflicting injury to the absent plaintiff." *Id.* Hostage-taking is the quintessential example of conduct "undertaken . . . with the intention of inflicting injury to" absent family members. *See id.*; *Sutherland*, 151 F. Supp. 2d at 50. Surely those who engage in hostage-taking

should not be shielded from liability on the basis of a prudential limitation that was never intended to be absolute and that has been relaxed for conduct that, while shocking, is far less egregious than the kind at issue here. *See, e.g., Cahalin v. Rebert*, 10 Pa. D. & C.3d 142, 150 (Pa. Dist. Ct. 1979) (declining to enforce the presence requirement where one parent conspired to kidnap a child and conceal the child's whereabouts from the other parent), *cited in Marlene F. v. Affiliated Psychiatric Med. Clinic*, 770 P.2d 278, 285 n.4 (Cal. 1989) (Arguelles, J., concurring); *see also Kajtazi v. Kajtazi*, 488 F. Supp. 15, 20 (E.D.N.Y. 1978) (allowing IIED claim by mother where father kidnapped child outside of her presence and fled the country). Accordingly, the Court concludes that Florida courts would recognize an exception to the presence requirement under the circumstances of this case.

The same conclusion follows with respect to Oklahoma, which, like Florida, has adopted Restatement (Second) Torts § 46 as the controlling standard for the IIED tort. *See Breeden v. League Servs. Corp.*, 575 P.2d 1374, 1376-78 (Okla. 1978). Oklahoma courts have identified the same four elements that IIED plaintiffs must establish: "(1) the defendant acted intentionally or recklessly; (2) the defendant's conduct was extreme and outrageous; (3) the defendant's conduct caused the plaintiff emotional distress; and (4) the resulting emotional distress was severe." *Computer Publ'n, Inc. v. Welton*, 49 P.3d 732, 735 (Okla. 2002). Iraq again does not contest that the allegations in the Third Amended Complaint, when construed in the light most favorable to plaintiffs, could establish these four elements. It instead hangs its hat on the

Restatement's presence requirement. As Iraq sees it, Oklahoma courts have never expressly addressed whether an absent plaintiff can state a claim for intentional infliction of emotional distress. But given the "narrow" interpretation that Oklahoma courts have otherwise given the IIED tort, Iraq insists that those courts would decline to dispense with the presence requirement, at least under the circumstances of this case *See* Def.'s Mem. at 17 (quoting *Welton*, 49 P.3d at 735); Def.'s Opp'n and Reply at 30.

For many of the reasons already given, the Court rejects Iraq's argument. First, another judge in this district recently predicted that Oklahoma courts would *not* enforce the presence requirement in an IIED suit brought by family members of American serviceman killed in a terrorist attack abroad. *See Estate of Heiser v. Islamic Republic of Iran*, 466 F. Supp. 2d 229, 354 (D.D.C. 2006). Assuming that prediction to be correct, it follows that Oklahoma courts would act similarly with respect to IIED claims based on hostage-taking, which present an even stronger case for either dispensing with the presence requirement or treating close relatives as direct victims. There is simply no reason to believe that an Oklahoma court adhering to § 46 of the Restatement would decline either to treat the close relatives of persons taken hostage by foreign governments or terrorist groups as direct victims of outrageous conduct, or to carve out an exception to the presence requirement for such people.

Finally, Iraq argues that the recent decision in *Reed v. Islamic Republic of Iran*, 439 F. Supp. 2d 53 (D.D.C. 2006), supports the proposition that some state courts would in fact enforce the presence

requirement for IIED claims arising from the kidnapping and torture of a relative. There are critical distinctions, however, between *Reed* and the present case. For one thing, Massachusetts law provided the rule of decision in *Reed*. *Id.* at 66. Massachusetts courts, though following § 46 of the Restatement, have placed a key gloss on the presence element, requiring a victim's family member to demonstrate that he or she had "substantial, contemporaneous knowledge" of the defendant's outrageous conduct. *Id.* at 66-67 (quoting *Nancy P. v. D'Amato*, 517 N.E.2d 824, 828 (Mass. 1988)). The *Reed* court relied exclusively on this judicial gloss in rejecting the plaintiff's IIED claim. *Id.* at 67 ("The element requiring substantial, contemporaneous knowledge of the defendant's act . . . bars the plaintiff from obtaining a default judgment as to this claim."). What is more, the plaintiff there admitted that he did not learn of his father's captivity and mistreatment until after his father had been released and had returned home. "The plaintiff's distress," the *Reed* court explained, "coincided with his father's behavior after his release and upon returning to the United States, rather than from the plaintiff having contemporaneous knowledge of his father's tribulations." *Id.* Here, in contrast, neither the Florida nor the Oklahoma courts have interpreted § 46 as imposing a "substantial, contemporaneous knowledge" requirement. And even if they did, plaintiffs aver in their Third Amended Complaint that they "were acutely aware of the circumstances surrounding their fathers' hostage-taking and mistreatment" at all times during the mens' captivity. Third Am. Comp. ¶ 23. Hence, plaintiffs would likely be able to satisfy a contemporaneous-knowledge requirement even if one

existed. Permitting plaintiffs to proceed with their IIED claims under Florida and Oklahoma law is therefore fully consistent with *Reed*.

C. Plaintiffs' Motion for Summary Judgment

The final issue is whether plaintiffs are entitled to partial summary judgment on the surviving count of their complaint. The merits of that issue, however, are largely obscured by a procedural morass created by a representation that plaintiffs' counsel made at the motions hearing and a series of procedural challenges levied by Iraq. Plaintiffs' written motion, though labeled as one for "summary judgment," was actually one for *partial* summary judgment on the issue of liability. That much is clear from the opening paragraph of the motion itself ("Plaintiffs hereby move . . . for an order granting summary judgment . . . as to liability"), the first paragraph of plaintiffs' Memorandum in support of their motion ("Plaintiffs . . . are entitled to partial summary judgment of liability as to all causes of action alleged in the Third Amended Complaint"), and the proposed order that plaintiffs attached to their motion. The proposed order specifically invoked Rule 56(c) of the Federal Rules of Civil Procedure, which permits courts to render "[a] summary judgment, interlocutory in character, . . . on the issue of liability alone although there is a genuine issue as to the amount of damages." Fed. R. Civ. P. 56(c). Having read these materials, the Court understood the issue to be rather straightforward: were plaintiffs entitled to partial summary judgment as to liability? In other words, had they established that there were no genuine issues of material fact in dispute with respect to whether Iraq (1) intentionally or recklessly (2) engaged in extreme and outrageous conduct (3)

that caused them (4) severe emotional distress, such that they were entitled to judgment as a matter of law? *See* Part B *supra*; *see also Williams*, 575 So.2d at 691; *Welton*, 49 P.3d at 735).

It is at this point that counsel's representation at the motions hearing acquires importance. Plaintiffs allege that they suffered severe emotional distress, and that this distress was "a direct result of their fathers' captivity." *See* Third Am. Compl. ¶¶ 22, 23, 29-31; Pls.' Rule 56.1 Stmt. ¶ 6. They did not, however, introduce any evidence—via, for example, affidavits from the plaintiffs themselves—beyond that which was presented during the earlier *Daliberti* litigation. And because plaintiffs were not parties in *Daliberti*, no evidence was introduced as to either their emotional response to their fathers' captivities or, assuming that they did suffer severe distress, whether that distress was caused by their fathers' predicament. Hence, toward the end of the motions hearing, the Court raised with counsel the concern that plaintiffs appeared to be "relying solely on the amended complaint" to establish the final two elements of the IIED cause of action. Prelim. Tr. at 58. The following colloquy ensued:

> MR. HALL: You're only going to the first two in the motion for summary judgment rules.
> THE COURT: Well, wait a minute. That's interesting. All four are elements of liability. I'm not talking about damages. All four are elements of liability. So you're only seeking summary judgment on the first and second elements of an [IIED claim], which are the intentional or reckless nature of it and the extreme or outrageous conduct?
> MR. HALL: Yes, that's right.

> THE COURT: Okay.
> MR. HALL: Because I think I'm obliged to ask for a partial summary judgment, or [Rule] 56(d) I think it is, you can deal with it on that level and then at some point we obviously have to offer you the evidence from the children as to the impact on them.

Id. As this passage reveals, counsel in essence conceded that plaintiffs had not established the final two elements of their IIED claim and were *not* entitled to summary judgment on the issue of liability. Counsel thus jettisoned plaintiffs' motion under Fed. R. Civ. P. 56(c) and instead asked the Court for what amounts to *partial* summary judgment, or what a leading treatise characterizes as a "partial summary adjudication." 10B C. Wright, A. Miller & M.K. Kane, Federal Practice and Procedure § 2737, at 324 (3d ed. 1998).

The substantive basis for a "partial summary adjudication" is Rule 56(d) of the Federal Rules of Civil Procedure. This rule permits a court that "finds that summary judgment cannot be granted because there are genuine issues of material fact to be tried, . . . to issue an order that specifies the facts that appear without substantial controversy," and thus "to salvage some results from the effort involved in the denial of a motion for summary judgment." *Id.* § 2737, at 311-12, 318; see also 11 James Wm. Moore et al., Moore's Federal Practice ¶ 56.40[2] (3d ed. 2003). Although Rule 56(d) has the salutary purpose of empowering courts "to withdraw sham issues from the case and to specify those facts that really cannot be controverted," 10B Wright, Miller & Kane § 2737, at 318, there is a division of authority over whether a party can make an independent motion for relief

under Rule 56(d). *Compare LaPrade v. Anderson*, Civ. A. No. 97-0010, 2006 WL 3469532, at *8 (D.D.C. Nov. 29, 2006) (endorsing the view that "'[t]here is no such thing as an independent motion under Rule 56(d)'") (quoting *Arado v. Gen. Fire Extinguisher Corp.*, 626 F. Supp. 506, 509 (N.D. Ill. 1985)), *with McDonnell v. Cardiothoracic & Vascular Surgical Assoc., Inc.*, Civ. A. No. 03-0079, 2004 WL 1234138, at *1-*3 (S.D. Ohio May 27, 2004) (relying on cases that endorse the opposite proposition).

There is significantly more consensus, however, regarding the power of a court that denies a motion for summary judgment under Rule 56(c) to issue an order under Rule 56(d) establishing certain facts as uncontroverted and limiting the issues to be tried. *See Singh v. George Washington Univ.*, 368 F. Supp. 2d 58, 68 (D.D.C. 2005) (denying the parties' summary judgment motions due to factual disputes on one element of a claim, but proceeding to evaluate the other elements because Rules 56(a) and 56(d) "contemplate a partial summary adjudication as to elements of a claim"); *see also* 10B Wright, Miller & Kane, Federal Practice and Procedure § 2737, at 316 (describing a Rule 56(d) order as "ancillary to a motion for summary judgment"). As mentioned above, plaintiffs' representation at the motions hearing obliges the Court to deny their motion for summary judgment under Rule 56(c), and to treat counsel's representation as an oral motion for an order under Rule 56(d). The question then becomes whether plaintiffs, through their pleadings and the one exhibit submitted in support of their motion, have established that the facts underlying the first two elements of their IIED claim are no longer in dispute. In answering that question and deciding

whether plaintiffs are entitled to a "partial summary adjudication," the Court will employ the familiar summary-judgment standard and will enter the requested order unless Iraq can point to "a genuine issue of material fact as it relates to a particular claim or aspect of a claim." 11 Moore's Federal Practice ¶ 56.40[2].

This is where Iraq's remaining procedural challenges come into play—"remaining" because the concession by plaintiffs' counsel effectively validates some challenges and moots others. Those challenges boil down to the contention that plaintiffs cannot get any relief—whether under Rule 56(c) or Rule 56(d)—solely on the basis of the facts alleged in their Third Amended Complaint and their Local Rule 56.1 statement. The facts alleged therein, Iraq points out, are supported only with references to Judge Oberdorfer's opinion in *Daliberti II*.

Whether couched in the terminology of the local rules or principles of preclusion law, however, Iraq's arguments lack merit. For one thing, it is far from clear that plaintiffs have actually failed to comply with the requirement in LCvR 56.1 (or the identically worded LCvR 7(h)) that all motions "for summary judgment . . . be accompanied by a statement of material facts as to which the moving party contends there is no genuine issue, which shall include references to the parts of the record relied on to support the statement." The thrust of Iraq's argument is that the facts asserted in a Rule 56.1 statement cannot be accepted as true and/or undisputed if such assertions are supported only with reference to the complaint and a prior judicial opinion. What Iraq does not explain, however, is why citations to the complaint and to a another opinion

from the same court on the same underlying facts do *not* constitute "references to the parts of the record relied on to support the statement." After all, both the complaint and the *Daliberti II* opinion are "parts of the record" as that record stands today. The federal rules certainly allow plaintiffs to seek summary judgment on the basis of these materials, *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (explaining that a summary judgment "motion may, and should, be granted so long as whatever is before the district court demonstrates that the standard for the entry of summary judgment, as set forth in Rule 56(c), is satisfied"), and Iraq has not pointed to any authority that would justify reading the local rule as imposing a more stringent standard. *See Burke v. Gould*, 286 F.3d 513, 519-20 (D.C. Cir. 2002) (explaining that the local rules are "to be construed in harmony with" the Federal Rules, and that "[a]lthough Local Rule 56.1 facilitates more precise identification of the record materials on which the parties rely, Rule 56(c) identifies the materials the court is to consider before granting summary judgment") (quoting LCvR 1.1(a)).

Moreover, if failure strictly to comply with the local rule is reason enough to penalize the offending party, then Iraq is by far the candidate more deserving of a sanction. Iraq's Rule 56.1 statement contains three paragraphs. The first assails plaintiffs' Rule 56.1 statement, while the second describes the difficulties that defense counsel has faced in communicating with the new Iraqi government. The third paragraph then concludes:

> Because of the absence of record citations by plaintiffs in their Rule 56.1 Statement, the absence of any record in this case, and the

> current situation in Iraq, defendant is not able to present a counterstatement as contemplated under LCvR 56.1 that addresses the facts the plaintiffs will need to establish to prove either jurisdiction or the merits of their claims, or to provide record citations relating to those facts.

Def.'s Rule 56.1 Statement ¶ 3. By its own account, then, Iraq has failed to provide the type of statement contemplated by the local rules, which allow the Court under such circumstances to "assume the facts identified by [plaintiffs] in [their] statement of facts [as] admitted." LCvR 56.1. But just as the Court declines to penalize the plaintiffs for less-than-perfect compliance with the local rules, it will not sanction Iraq, whose counsel has labored under highly unusual circumstances, for failing to provide a proper Rule 56.1 Statement.

It bears emphasizing, however, that the difficulties that counsel has encountered do not excuse Iraq's failure to lodge a challenge to any of the facts alleged by plaintiffs. For example, counsel could have brought its communication problems to the Court's attention and sought on that basis a stay of the obligation to respond to plaintiffs' motion for partial summary judgment. *See La Réunion Aérienne v. The Socialist People's Libyan Arab Jamahiriya*,—F. Supp. 2d —, 2007 WL 706938, at *6 (D.D.C. March 9, 2007) (granting foreign sovereign's request for a stay of the plaintiff's motion for summary judgment pending resolution of a motion to dismiss). Counsel may also have considered filing an affidavit pursuant to Fed. R. Civ. P. 56(f) requesting additional time for discovery. *See Pugh v. Socialist People's Libyan Arab Jamahiriya*, Civ. A. No. 02-2026, 2006 WL 2384915,

at *4 (D.D.C. May 11, 2006) (rejecting foreign state's procedural objections to summary judgment motion and noting that Rule 56(f) is the way for "a non-movant who wishes to postpone summary judgment to obtain further discovery"). But having failed to pursue these measures or other possible avenues of relief, and having failed (by its own admission) to conduct the necessary factual investigation, *see* Prelim. Tr. at 37, Iraq cannot create a factual dispute simply by critiquing plaintiffs' reliance on the *Daliberti II* opinion as a shortcut for the voluminous testimony and other evidence introduced in that default-judgment proceeding.

At bottom, the real question underlying the propriety of a Rule 56(d) order is whether the facts as found after the four-day bench trial in *Daliberti II* need to be relitigated here. In answering that they do, Iraq maintains that plaintiffs cannot seek to establish the facts governing this case under "the doctrine of offensive collateral estoppel." *See* Def.'s Opp'n and Reply at 32. Iraq is certainly correct that plaintiffs were not parties to the *Daliberti* litigation and that they cannot use principles of issue preclusion to bar Iraq from contesting the facts as found there. *See Arizona v. California*, 530 U.S. 392, 414 (2000) (recognizing that issue preclusion does not attach to default judgments) (citing Restatement (Second) of Judgments § 27, comment e, p. 257 (1982)). This argument carries little weight, however, because Iraq has not sought in any of its filings to contest the facts surrounding the kidnapping and detention of Beaty and Barloon. Nor does counsel's generic contention at the motions hearing that Iraq does not concede the facts suffice to create a factual dispute. Prelim. Tr. at 35. In short, plaintiffs'

reliance on the *Daliberti II* opinion as a shortcut for reproducing the evidentiary record from that case has not precluded Iraq from disputing any of the facts material to plaintiffs' surviving claim. Iraq has simply chosen not to do so.

For similar reasons, the decision in *Weinstein v. Islamic Republic of Iran*, 175 F. Supp. 2d 13 (D.D.C. 2001), is of little help to Iraq. In that default-judgment proceeding, Judge Lamberth (1) declined to take judicial notice of the findings of fact and conclusions of law previously issued in another default-judgment proceeding involving the same defendants and the same underlying facts, and (2) refused to hold that the defendants were "collaterally estopped from relitigating" the findings and conclusions from the earlier case. *Id.* at 16-17. Again, however, plaintiffs have not attempted to prevent Iraq from challenging the factual basis for their claims; Iraq has simply decided not to, or been unable to do so. And while there is some room for debate as to the power of courts to assume the truth of court proceedings that have been judicially noticed, *compare Estate of Heiser*, 466 F. Supp. 2d at 263, *and Salazar*, 370 F. Supp. 2d at 109 n.6, *with Howard v. Gutierrez*,—F. Supp. 2d—, 2007 WL 404352, at *9 n.5 (D.D.C. Feb. 6, 2007), *Weinstein* is also easily distinguishable in this regard. In declining to take judicial notice in that case, Judge Lamberth emphasized that, had the defendants entered an appearance either in the current or the previous case, "they almost certainly would dispute the accuracy of th[e] particular facts" found. 175 F. Supp. 2d at 17. Iraq, in sharp contrast, has entered an appearance here and, despite the opportunity to do so, has not "dispute[d] the accuracy of th[e]

particular facts" found in *Daliberti II*. Accordingly, Iraq's reliance on principles of issue preclusion generally, and on *Weinstein* specifically, is misplaced.

Finally, Iraq argues that the FSIA itself bars the Court from entering summary judgment in plaintiffs' favor. The statute prohibits district courts from entering a *default judgment* against a foreign state "unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." 28 U.S.C. § 1608(e). "Obviously," Iraq insists, "no less is required when a plaintiff seeks summary judgment against a foreign state that has entered an appearance." Def.'s Opp'n and Reply at 32. Although there is a strong argument that the statutory standard for entering a default judgment against an absent foreign sovereign does *not* apply to a motion for summary judgment actively opposed by a foreign state that has entered an appearance through counsel, the Court need not resolve this question because an order under Fed. R. Civ. P. 56(d) does not qualify as an entry of judgment. See 10B Wright, Miller & Kane, Federal Practice and Procedure § 2737, at 323 (citing 1948 Advisory Committee Notes to Rule 56).

Because the material facts underlying two elements of plaintiffs' IIED claim "exist without substantial controversy," and because plaintiffs have conceded that they are not yet entitled to judgment on the question of liability, the Court will deny their motion for partial summary judgment under Rule 56(c) but grant their oral motion for partial summary adjudication under Rule 56(d). The facts underlying the detention, imprisonment, and release of Kevin Beaty and William Barloon, as described in *Daliberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001)

("*Daliberti II*"), "shall be deemed established" for the purposes of all further proceedings in this case. See Fed. R. Civ. P. 56(d); 10B Wright, Miller & Kane, Federal Practice and Procedure, § 2737, at 323. These facts equate to those set forth in paragraphs 7-20 of the Third Amended Complaint, and paragraphs 1-3, 7-8, and 14-17 of plaintiffs' Rule 56.1 statement.

CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part defendant's motion to dismiss, and grants in part and denies in part plaintiffs' motion for partial summary judgment. A separate order has been posted on this date.

/s/
JOHN D. BATES
United States District Judge

Dated: March 20, 2007

APPENDIX U

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBIN BEATY, et al., **Plaintiffs,** **v.** **REPUBLIC OF IRAQ,** **Defendant.**	**Civil Action No. 03-0215 (JDB)**

ORDER

Upon consideration of defendant's motion to dismiss; plaintiffs' motion for partial summary judgment; the Statements of Interest filed by the United States; the responses and replies thereto; the arguments presented at the motions hearing held on March 2, 2007; and the entire record herein; and for the reasons stated in the Memorandum Opinion issued on this date; it is this 20th day of March, 2007, hereby

ORDERED that defendant's motion to dismiss is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that defendant's motion to dismiss Count I of the Third Amended Complaint is **DENIED**; it is further

ORDERED t defendant's motion to dismiss Counts II and III of the Third Amended Complaint is **GRANTED**, and these counts are dismissed with prejudice; it is further

ORDERED that plaintiffs' motion for partial summary judgment is **GRANTED IN PART** and **DENIED IN PART**; it is further

ORDERED that plaintiffs' motion for partial summary judgment as to liability pursuant to Fed. R. Civ. P. 56(c) is **DENIED**; it is further

ORDERED that plaintiffs' motion for partial summary adjudication pursuant to Fed. R. Civ. P. 56(d) is **GRANTED**, and the facts set forth in paragraphs 7-20 of the Third Amended Complaint, and paragraphs 1-3, 7-8, and 14-17 of plaintiffs' Rule 56.1 statement shall be deemed established for the purposes of all further proceedings in this case; and it is further

ORDERED that the parties shall appear for a Status Conference at 9:00 a.m. on April 24, 2007 to discuss further proceedings in this matter.

SO ORDERED.

_____/s/_____
JOHN D. BATES
United States District Judge

Dated: March 20, 2007

APPENDIX V

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 07-7057 **September Term, 2007**
03cv00215

Robin Beaty, *et al.*,
Appellees
v.
Republic of Iraq,
Appellant
United States of America,
Appellee

Filed On:
November 6, 2007
[1078597]

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, Brown, Griffith, and Kavanaugh, Circuit Judges*

ORDER

Upon consideration of the petition for initial hearing en banc, the corrected brief of the United States in support of the petition for initial hearing en banc, the motion to strike the brief of the United

* Circuit Judges Brown and Kavanaugh would grant the petition for initial hearing on banc.

States, the oppositions thereto, and the alternative motion for leave to file the brief of the United States, it is

ORDERED that the motion to strike the brief of the United States be denied. It is

FURTHER ORDERED that the motion for leave to file the brief of the United States be granted. It is

FURTHER ORDERED that the petition for initial hearing en banc be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
Deputy Clerk/LD

APPENDIX W

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT COURT OF COLUMBIA CIRCUIT

No. 07-7057 **September Term, 2007**

[1081679]
Robin Beaty, *et al.*,
Appellees
v.
Republic of Iraq,
Appellant

03cv00215

Filed On: November 21, 2007

BEFORE: Sentelle, Randolph and Brown, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the opposition thereto, and the reply, it is

ORDERED that the motion for summary affirmance be granted. The district court correctly held that the Republic of Iraq's sovereign immunity, waived or abrogated under 28 U.S.C. § 1605(a)(7), has not been restored under the Emergency Wartime Supplemental Appropriations Act ("EWSAA"), Pub. L. No. 108-11, 117 Stat. 559 (2003), and Presidential Determination 2003-23. *See Acree v. Republic of Iraq*, 370 F.3d 41, 51 (D.C. Cir. 2004). The merits of the

parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam).

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or petition for rehearing en banc. *See* Fed. R. App. P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX X

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7175 Robert Simon, et al., Appellants v. Republic of Iraq, et al., Appellees Consolidated with 06-7178	**September Term, 2007** **03cv00691** **03cv00888** **Filed On: February 4, 2008 [1096994]**

BEFORE: Ginsburg, *Chief Judge*, and Sentelle and Brown, *Circuit Judges*

ORDER

Upon consideration of appellants' motion for leave to file motion for summary reversal or, in the alternative, to remand; appellee's motion to extend time to file a response thereto; enactment of the National Defense Authorization Act for Fiscal Year 2008, § 1083 of which strikes 28 U.S.C. § 1605(a)(7) and adds new § 1605A; and of the President's waiver, pursuant to § 1083(d) thereof, of "all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof," President George W.

Bush, Memorandum of Justification for Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 with Respect to Iraq (Jan. 28, 2008), *available at* http://www.whitehouse.gov/news/releases/2008/01/2008 128-12.html, it is

ORDERED that the parties file simultaneous briefs of no more than 15 pages by February 19, 2008 at 4:00 p.m., addressing the effect upon this case, if any, of the new Act and of the President's waiver. In particular, the parties should address whether pending cases filed under former § 1605(a)(7) may proceed on the basis of that provision. All submissions must be served and filed by hand. It is

FURTHER ORDERED that the motion of the Republic of Iraq for an extension of time be dismissed as moot.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Cheri Carter
Deputy Clerk

APPENDIX Y

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 12, 2007 Decided June 24, 2008

No. 06-7175

ROBERT SIMON, ET AL.,
APPELLANTS

v.

REPUBLIC OF IRAQ, ET AL.,
APPELLEES

Consolidated with
06-7178

Appeals from the United States District Court
for the District of Columbia
(No. 03cv00691)
(No. 03cv00888)

Michael Rips argued the cause for appellants. With him on the briefs were *Stephen A. Fennell*, *Anthony F. Cavanaugh*, *Anthony A. Onorato*, *Justin B. Perri*, and *Alice Loughran*.

Eric J. Hecker, *Richard D. Emery*, and *Sarah Netburn* were on the brief for amici curiae Ethel Hurst, et al. in support of appellants.

Lawrence H. Martin argued the cause for appellees. With him on the briefs were *Gare A. Smith*, *Sarah A. Altschuller*, *Timothy B. Mills*, and *Jonathan S. Franklin*.

Before: SENTELLE, *Chief Judge*, and GINSBURG and BROWN, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* GINSBURG.

GINSBURG, *Circuit Judge*: The plaintiffs in these two consolidated actions sued Iraq, the Iraqi Intelligence Service, and Saddam Hussein (together, Iraq) alleging they had tortured and taken certain of them hostage during the 1990-91 Gulf War. The plaintiffs relied upon 28 U.S.C. § 1605(a)(7), the exception in the Foreign Sovereign Immunities Act (FSIA), § 1602 *et seq.*, that allowed for lawsuits against state sponsors of terrorism. The district court dismissed the actions as untimely and the plaintiffs appealed. Iraq defends the district court's interpretation of the time limitation in the FSIA and alternatively invokes the political question doctrine.

After this appeal was briefed and argued, the Congress passed the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, 122 Stat. 3, § 1083 of which revised the terrorism exception to sovereign immunity by repealing § 1605(a)(7) of Title 28 and adding a new exception to be codified at § 1605A of Title 28. Section 1083(d) of the NDAA granted the President the authority to waive § 1083 with respect to Iraq, which he promptly did.

For the reasons that follow, we conclude the plaintiffs may maintain these suits pursuant to § 1605(a)(7), and their cases are timely and justiciable. Accordingly, we remand these matters to the district court for further proceedings.

I. Background

In 1996 the Congress amended the FSIA to abrogate in certain respects the sovereign immunity of any foreign state the Secretary of State designates a sponsor of terrorism. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 221, 110 Stat. 1214, 1241-43 (codified at 28 U.S.C. § 1605(a)(7)); *see also* 28 U.S.C. § 1604 (granting immunity to foreign states, their agencies, and their instrumentalities). As amended, § 1605(a)(7) provided in part that a foreign state was not immune from an action for damages "for personal injury ... caused by an act of torture ... [or] hostage taking" to a U.S. national if the foreign state had been "designated as a state sponsor of terrorism ... at the time the act occurred" and the plaintiff had given the foreign state "a reasonable opportunity to arbitrate the claim." The statute defined torture and hostage taking, see §§ 1605(e), 1350 note, by reference to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 1(1), Dec. 10, 1984, 1465 U.N.T.S. 85, and the International Convention Against the Taking of Hostages art. 1, Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205.

The plaintiffs filed their actions in 2003 and duly invoked § 1605(a)(7). Their amended complaints alleged that in 1990 and 1991 the defendants had tortured certain of the plaintiffs and held them hostage, in violation of local, federal, and

international law; the other plaintiffs, members of the alleged victims' families, sued for intentional infliction of emotional distress. Iraq was at all relevant times a designated state sponsor of terrorism, 55 Fed. Reg. 37,793 (Sept. 13, 1990), and the complaints alleged the plaintiffs had offered Iraq the opportunity to arbitrate the disputes.

Iraq and the Iraqi Intelligence Service filed motions to dismiss both cases on the grounds that the actions were untimely under § 1605(f), which provides a limitation period of ten years for any action under § 1605(a)(7); the plaintiffs had failed to state a claim upon which relief could be granted; and the political question doctrine barred the court from proceeding. The district court held the two actions did not raise political questions but dismissed them as untimely. *Vine v. Republic of Iraq*, 459 F. Supp. 2d 10 (2006).

II. Analysis

On appeal, Iraq newly contends the recent enactment of the NDAA and the President's waiver of § 1083 thereof require the dismissal of these cases. Alternatively, Iraq argues the cases were untimely filed and are barred by the political question doctrine. Addressing the issues of law *de novo*, we reject each of Iraq's contentions.

A. NDAA 2008

On December 14, 2007 the Congress passed the first version of the NDAA, § 1083 of which would have amended the terrorism exception to foreign sovereign immunity by striking 28 U.S.C. § 1605(a)(7), the exception upon which the plaintiffs relied, and enacting a new exception, to be codified at 28 U.S.C. § 1605A. President Bush sought to "pocket

veto" the bill because he believed § 1083 would threaten the reconstruction of Iraq:

> [S]ection 1083 would risk the freezing of substantial Iraqi assets in the United States .... Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed.

Memorandum of Disapproval, 43 WEEKLY COMP. PRES. DOC. 1641, 1641 (Dec. 28, 2007).

The Congress subsequently passed a revised version of the NDAA, which included a new provision (§ 1083(d)) that authorized the President, upon making certain findings, to "waive any provision of [§ 1083 of the NDAA] with respect to Iraq." The President signed that bill into law and promptly exercised his authority under § 1083(d)(1) to waive "all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof." Presidential Determination No. 2008-9, 73 Fed. Reg. 6571 (Jan. 28, 2008).* Iraq contends the enactment of the NDAA and the President's waiver of § 1083 with

* The President had to and did find that "waiver is in the national security interest of the United States" and "will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq," and that "Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism." NDAA § 1083(d)(1); *see* 73 Fed. Reg. at 6571 (so finding).

respect to Iraq stripped the federal courts of jurisdiction over these cases; the plaintiffs disagree, of course.

Section 1083(a) of the NDAA, which amended the FSIA by creating new § 1605A of Title 28, contains an exception to the grant of sovereign immunity similar to that in former § 1605(a)(7) but more advantageous to plaintiffs in several respects. For instance, it precludes a foreign state from filing an interlocutory appeal under the "collateral order" doctrine, § 1605A(f), and permits a plaintiff to attach property in advance of judgment, § 1605A(g). In addition, § 1605A(c) abrogates *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004), by creating a federal right of action against foreign states, for which punitive damages may be awarded.

Iraq argues that because § 1083(b)(1) of the NDAA repeals § 1605(a)(7) of the FSIA, upon which the present cases were founded, we must dismiss these cases for want of jurisdiction. *See* 28 U.S.C. §§ 1330(a), 1604 (jurisdiction over case against foreign sovereign depends upon exception to immunity). Further, according to Iraq, the President's waiver of § 1083 of the NDAA prevents the plaintiffs from refiling their cases under the jurisdiction conferred by new § 1605A.

A statute removing federal jurisdiction presumptively applies to pending cases because such a statute "usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006) (quoting *Hallowell v. Commons*, 239 U.S. 506, 508 (1916)); *see also Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 951 (1997). In

contrast, a statute that retroactively alters the consequences of primary conduct—as by "impair[ing] rights a party possessed when he acted, increas[ing] a party's liability for past conduct, or impos[ing] new duties with respect to transactions already completed," *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)—is presumptively nonretroactive; such a statute applies to a pending case only if the Congress clearly so provides.

The FSIA speaks to the jurisdiction of the federal courts, but it also governs the immunity of foreign states in any U.S. forum. *See* 28 U.S.C. § 1604 ("a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter"); *cf. Hughes Aircraft Co.*, 520 U.S. at 951 ("statutes affect[ing] ... whether [a suit] may be brought at all ... speak[] not just to the power of a particular court but to the substantive rights of the parties as well" and are therefore "subject to [the] presumption against retroactivity"). Accordingly, it is not clear which presumption might apply, if any is needed. In this case, however, it is unnecessary to invoke either presumption because § 1083 makes several references to pending cases and we need not look beyond the text and structure of the NDAA to ascertain its effect upon cases brought under § 1605(a)(7). *Accord Hamdan*, 126 S. Ct. at 2762-69 (holding, based upon "[o]rdinary principles of statutory construction," the provision of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Title X, 119 Stat. 2680, 2739-44, that deprived the courts of jurisdiction over habeas petitions filed by persons detained at Guantánamo Bay did not apply to habeas cases pending when it was enacted). For the reasons

that follow, we conclude that the courts retained jurisdiction over cases pending pursuant to former § 1605(a)(7) when the Congress enacted the NDAA. *Cf. Republic of Austria v. Altmann*, 541 U.S. 677, 697-700 (2004) (applying ordinary principles of construction to decide whether FSIA, which codified immunity of foreign sovereigns, applies to conduct predating statute).

We note first that the new terrorism exception in § 1605A by its terms does not provide a substitute basis for jurisdiction over all cases pending under § 1605(a)(7) when § 1605A replaced it. The new provision deprives a foreign sovereign of immunity to suit only if

> (I) the foreign state was designated as a state sponsor of terrorism at the time the act [giving rise to the suit] occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or
>
> (II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the [NDAA for] 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) ... was filed.

28 U.S.C. § 1605A(a)(2)(A)(i). Inasmuch as this provision expressly distinguishes between cases "filed under this section"—*i.e.*, § 1605A—and cases "filed under section 1605(a)(7)" of the pre-amendment Act, a pending case obviously cannot be said to have been "filed under" the new provision. Therefore, the plaintiff in a case pending under § 1605(a)(7) may not maintain that action based upon the jurisdiction conferred by § 1605A; in order to claim the benefits of § 1605A, the plaintiff must file a new action under that new provision.

Because the courts have no jurisdiction of a case against a foreign sovereign absent an exception to the grant of immunity in the FSIA, and because § 1605A does not provide that exception for pending cases, Iraq contends the NDAA requires the dismissal of these cases. The plaintiffs, on the other hand, argue that § 1605(a)(7) remains a viable exception to immunity for cases, such as these, filed when it was the source of our jurisdiction. Based upon the following analysis of NDAA §§ 1083(c) ("Application to Pending Cases") and 1083(d) ("Applicability to Iraq"), we hold the courts retain jurisdiction pursuant to § 1605(a)(7) over cases that were pending under that section when the Congress enacted the NDAA.

Section 1083(c)(1). The first subsection of § 1083(c) provides: "The amendments made by this section [1083] shall apply to any claim arising under section 1605A." Because, as we have said, a claim pending under former § 1605(a)(7) when the NDAA became law did not "aris[e] under section 1605A," *cf. Am. Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) ("A suit arises under the law that creates the cause of action"), it is apparent that the 2008

amendments, including the "conforming amendments" that strike former § 1605(a)(7), *see* NDAA § 1083(b), do not apply to any claim then "pending" under that provision. Moreover, reading the Act to extinguish jurisdiction over cases pending under § 1605(a)(7) when the NDAA became law would render § 1083(c)(1) nugatory: There would be no need to specify "the amendments ... apply to any claim arising under section 1605A" for the amendments obviously would apply to any such claim and could apply to no other claim; as we interpret it, however, § 1083(c)(1) makes clear the "amendments" apply to any claim under § 1605A, but to no "pending" claims.*

Sections 1083(c)(2) and (c)(3). Plaintiffs with "pending cases" may invoke new § 1605A in certain circumstances. Pursuant to § 1083(c)(2) ("Prior Actions"), a plaintiff who detrimentally "relied upon" former § 1605(a)(7) of the FSIA "as creating a cause of action" and whose action was "pending before the courts in any form" when the NDAA became law was given 60 days within which to "refile" his suit based upon the new cause of action created by § 1605A(c). *See also* 28 U.S.C. § 1605A(a)(2)(A)(i)(II) (providing exception to immunity for "original action" that is "refiled ... by reason of section 1083(c)(2)(A)"). Section 1083(c)(3) of the NDAA ("Related Actions") authorizes a plaintiff who had "timely commenced" a "related action" under § 1605(a)(7) to bring "any other action arising out of the same act or incident," provided "the [new] action is commenced" within 60 days from the later of "(A) the date of the entry of

* In consequence, only a plaintiff prosecuting an action under new § 1605A of the FSIA can claim the benefits of that section, such as prejudgment attachment of the defendant's property.

judgment in the original action or (B) the date of the enactment of [the NDAA]."

These "transition rules," as Iraq calls them, cannot be squared with Iraq's position that the NDAA requires the dismissal of pending cases. The 60-day limit in § 1083(c)(3) implies a court could, after enactment of the NDAA, still enter judgment in an action filed under § 1605(a)(7). Iraq argues that in this context "entry of judgment" means only dismissal for want of jurisdiction rather than the entry of a judgment on the merits, but nothing in the text of § 1083 suggests the phrase has such a narrow meaning, *cf.* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "judgment" to mean judgment on the merits), and the structure of the NDAA indicates precisely the opposite. New § 1605A(a)(2)(A)(i)(II) of the FSIA refers to a pending "original action" being "refiled ... by reason of section 1083(c)(2)(A)" of the NDAA while referring to a new action being "filed ... by reason of section 1083(c)(3)" if a pending "related action" had been timely commenced, *see* 28 U.S.C. § 1605A(b), which implies the Congress understood that the courts would retain jurisdiction over the original "related action" described in § 1083(c)(3). That explains why the 60-day period for invoking § 1083(c)(2) began with the enactment of the NDAA, *see* § 1083(c)(2)(C)(ii), whereas the 60-day period in § 1083(c)(3) may run from "the date of the entry of judgment" in the "related action," which could be well after the enactment of the NDAA.

There would be no reason for the Congress to have tied the 60-day period in § 1083(c)(3) to the date of "entry of judgment" in a case pending under § 1605(a)(7) when the NDAA became law if, as Iraq argues, the quoted words mean only a dismissal for

want of jurisdiction and the Act requires the dismissal of all pending cases. The text and structure of the NDAA thus compel the conclusion that, notwithstanding the enactment of the NDAA, a court still may enter a judgment on the merits in such a case, which it could not do if it did not have jurisdiction over the case. *See, e.g.*, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause"). Because new § 1605A is inapplicable, that jurisdiction over pending cases can be founded only upon former § 1605(a)(7).*

Section 1083(c)(4). The final provision of § 1083(c) also is instructive. In 2003 the President acted under the Emergency Wartime Supplemental Appropriations Act of 2003 (EWSAA), Pub. L. No. 108-11, § 1503, 117 Stat. 559, 579, to "make inapplicable with respect to Iraq ... any ... provision of law that applies to countries that have supported terrorism." Presidential Determination No. 2003-23, 68 Fed. Reg. 26,459 (May 7, 2003).

In *Acree v. Republic of Iraq*, 370 F.3d 41 (2004), however, we held that the EWSAA did not authorize the President to suspend former § 1605(a)(7) with

* Iraq argues also that the 60-day rule authorizes the refiling of claims under § 1605A within 60 days following the date of entry of "judgment on claims involving non-sovereign parties or a different exception to sovereign immunity unaffected by Section 1083." That is clearly wrong. The 60-day period is tied to "the date of the entry of judgment in [an] original action" that was "timely commenced under section 1605(a)(7)," NDAA § 1083(c)(3); § 1605(a)(7) permits suits only against sovereign states, leaving no room for a case brought under "a different exception to sovereign immunity."

respect to Iraq. Paragraph (4) ("Preserving the Jurisdiction of the Courts") of subsection 1083(c) ("Application to Pending Cases") ratifies that holding: "Nothing in section 1503 of the [EWSAA] ... has ever authorized" the President to "mak[e] inapplicable ... any provision of [the FSIA or to] remov[e] ... the jurisdiction" of the federal courts. Thus both the text and the context of this provision make clear the Congress was intent upon "preserving" the courts' jurisdiction over "pending cases," which could only mean cases filed under former § 1605(a)(7).

Section 1083(d)(1). This section authorizes the President to "waive any provision of ... section [1083 of the NDAA] with respect to Iraq." If a suit against Iraq for terrorist acts could proceed only under § 1605A, as Iraq maintains, then the President could use § 1083(d)(1) to deprive the courts of jurisdiction and would have no reason ever to invoke the EWSAA; § 1083(c)(4) would be surplusage. *Cf. Duncan v. Walker*, 533 U.S. 167, 174 (2001) (we must "give effect ... to every clause and word of [the] statute").* Moreover, § 1083(d)(2)(C), which provides that the President's waiver authority applies "regardless of whether ... that authority affects any action filed before ... enactment of the [NDAA]," would be unnecessary if the Act deprived the courts of jurisdiction over pending cases.

Reading the NDAA, as we do, to leave intact jurisdiction over cases pending under former

---

* Iraq has not been designated a state sponsor of terrorism since 2004. 69 Fed. Reg. 61,702 (Oct. 20, 2004). Accordingly, even absent the President's waiver, no new action could have been filed against Iraq unless a prior or a related action was pending. See 28 U.S.C. § 1605A(a)(2)(A)(i).

§ 1605(a)(7) gives meaning both to § 1083(c)(4) and to § 1083(d) and makes sense of the relation between them. Section 1083(c)(4) clarifies that the President has no authority under the EWSAA to limit the jurisdiction of the courts over cases against Iraq. Section 1083(d)(1) then grants the President the authority to render inapplicable those provisions of the NDAA to which President Bush had objected when he vetoed the first version of the NDAA.*

. . .

Cognizant of the President's concerns and of the potential implications of our holding upon the foreign affairs of the United States, we do not lightly conclude the NDAA leaves intact our jurisdiction over cases, such as these, that were pending against Iraq when the Congress enacted the NDAA. Nonetheless, the NDAA fairly compels the conclusion that the plaintiffs may proceed on the basis of former § 1605(a)(7). It follows that the President's waiver of § 1083 of the NDAA with respect to Iraq affects neither the jurisdiction of the district court over cases pending under § 1605(a)(7) nor the issues presented on this appeal.**

B. Timeliness

The jurisdictional provision upon which the plaintiffs rely contains a limitation period:

---

* The President raised the same concerns when he exercised his waiver authority. 73 Fed. Reg. 6571 (discussing same non-jurisdictional implications).

** We have no occasion, therefore, to address the plaintiffs' alternative argument that the President left § 1605(a)(7) intact by waiving "all" provisions of § 1083 including subsection (b)(1)(A)(iii), which repeals former § 1605(a)(7).

> No action shall be maintained under [§ 1605(a)(7)] unless the action is commenced not later than 10 years after the date on which the cause of action arose. All principles of equitable tolling, including the period during which the foreign state was immune from suit, shall apply in calculating this limitation period.

28 U.S.C. § 1605(f) (2007). The plaintiffs contend their actions, which they filed in 2003, are timely even though the alleged torts occurred more than ten years earlier, in 1990 and 1991. They argue first that their causes of action did not arise, and the ten-year limitation therefore did not begin to run, until 1996, because they could not have sued Iraq before then. They contend alternatively that the ten-year limitation period was equitably tolled until 1996; more precisely, they argue § 1605(f) requires that we extend the period of limitation by "the period during which [Iraq] was immune from suit." We agree with their alternative argument and, accordingly, need not reach the (rather strained) argument that their claims did not arise until 1996.

Section 1605(f) expressly incorporates "principles of equitable tolling." Iraq argues—and we do not disagree—the statute thereby incorporates the relevant common law. According to Iraq that means the plaintiffs are entitled only to a "reasonable" extension of the statute of limitations, *Phillips v. Heine*, 984 F.2d 489 (D.C. Cir. 1993); the suits would then be untimely—assuming, as we do for the sake of the argument, the plaintiffs' causes of action arose in 1990 and 1991—because the plaintiffs have not demonstrated they reasonably required an extension

to 2003, two or three years beyond the expiration of the statute of limitations, in order to bring their cases.

It seems, however, we have not applied the doctrine of equitable tolling consistently in the manner Iraq suggests. In *Phillips*, upon which Iraq relies, we held that "tolling does not bring about an automatic extension of the statute of limitations by the length of the tolling period. ... It gives the plaintiff extra time only if he needs it," 984 F.2d at 492; that is, the plaintiff obtains a "reasonable" extension. In *United States v. Saro*, 252 F.3d 449 (2001), in contrast, we held that equitable tolling stops the clock for the duration of a tolling event. *Id.* at 454 (citing *United States v. Ibarra*, 502 U.S. 1, 4 n.2 (1991) (dictum)); *see* Calvin W. Corman, Limitation of Actions § 8.2 (1991) ("When the commencement of an action is stayed due to statutory prohibition, the period of the stay is not included in the calculation of the limitation period"); *cf. Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 434-35 (1965) (equitable tolling, rather than giving plaintiff a "reasonable" extension of statute of limitations in FELA, stops clock for duration of tolling event).

Saro and *Phillips* undoubtedly conflict, and our subsequent cases do not resolve the conflict. In *Chung v. DOJ*, upon holding the distinct doctrine of equitable estoppel (which is based upon the conduct of the defendant) did not extend the statute of limitations on the facts of that case, we left it to the district court on remand to decide, à la *Phillips*, whether the plaintiff was entitled to a "reasonable" extension of the statute of limitations under the doctrine of equitable tolling. 333 F.3d 273, 278-80 (2003). We did not notice the conflict between *Saro*

and *Phillips*. We now see not only the intra-circuit but also an inter-circuit inconsistency. *Compare Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 452 (7th Cir. 1991) (tolling provides a reasonable extension), with *Socop-Gonzalez v. INS*, 272 F.3d 1176, 1193-96 (9th Cir. 2001) (en banc) (tolling stops the clock).

We need not resolve our home-grown conflict in this case because the statute is clear: We "include," i.e., add, "the period during which [Iraq] was immune from suit"; hence cases filed in 2003 are timely.* Iraq asserts that, because we narrowly interpret the waiver of immunity by a sovereign state, *see, e.g.*, *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990) (waiver by the United States); *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1162 (D.C. Cir. 2002) (waiver by foreign state), we ought strictly to interpret § 1605(f) and limit Iraq's exposure by following *Phillips*. Cases on the scope of a waiver with its consequences for the fisc are inapposite, however, for the Congress did not waive Iraq's sovereign immunity in enacting § 1605(a)(7); only the sovereign can forswear the sovereign's legal rights. In the terrorism exception the Congress qualified the statutory grant of immunity to Iraq, itself a matter of "grace and comity." *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Iraq has pointed to no authority suggesting the Congress intended

---

* Nor need we decide whether the statute would call for the application of state rather than federal common law, whatever the latter may be, with regard to equitable tolling. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938); 28 U.S.C. § 1652; *see also United States v. Yazell*, 382 U.S. 341 (1966) (applying state law in interstices of federal statute).

courts to read § 1605(f) any more narrowly than its terms suggest; nor are we aware of any case in which a court presumed or suggested exceptions to foreign sovereign immunity should be construed narrowly. *Cf. Saudi Arabia v. Nelson*, 507 U.S. 349, 356-58 (1993) (using ordinary methods of construction to interpret exception in § 1605(a)(2)).

We are therefore left to interpret the plain text of § 1605(f) unencumbered by any special canons of construction, and the text makes clear Iraq's interpretation must fail. Section 1605(f) invokes the "principles of equitable tolling" and expressly requires that in "calculating [the ten-year] limitation period" we "includ[e] the period during which [Iraq] was immune from suit." To say the plaintiffs were entitled only to a reasonable term after the ten-year period ran out in 2000 or 2001 would not fulfill the mandate that we "includ[e]" the five or six years of Iraq's immunity in the calculation of the limitations period. Thus, to read the statute as Iraq insists would deprive the quoted phrases of their plain meaning.

The Congress first amended the FSIA to add a terrorism exception in 1996, before which Iraq was "immune from suit"; hence the limitation period in § 1605(f) began to run in 1996 and expired in 2006. Accordingly, the plaintiffs timely filed their actions in 2003.

C. Political Question Doctrine

Iraq asserts that the present cases are barred by the political question doctrine, for which proposition it points to several of the President's statements suggesting this action is contrary to the foreign

policy of the United States.* We have already noted and quoted Presidential Determination 2003-23 under the EWSAA. 68 Fed. Reg. 26,459. The President also issued Executive Order 13,303 declaring that "the threat of attachment or other judicial process" against Iraqi oil interests "obstructs the orderly reconstruction of Iraq," 68 Fed. Reg. 31,931 (May 22, 2003), and sent a message to the Congress stating that he had used his authority under the EWSAA to make § 1605(a)(7) inapplicable to Iraq because the "threat of attachment or other judicial process" against Iraqi oil assets "constituted an unusual and extraordinary threat to the national security and foreign policy of the United States." 39 WEEKLY COMP. PRES. DOC. 647, 647-48 (May 22, 2003).

In addition, Iraq points to an unenacted version of the Foreign Relations Authorization Act of 2004, *see* S. 925, 108th Cong. § 811 (2003), asserting that the Congress "voiced its support for the President's determination" that suits such as these are contrary to the foreign policy of the United States. The Senate Foreign Relations Committee approved that bill, but the Committee does not speak for the Congress, which last spoke to this subject when it enacted the NDAA. Therefore, we confine our analysis to the

---

* Iraq's principal argument does not assume the President's statements have the force of law. Iraq's alternative argument is that certain of those statements do have the force of law because the President was acting under the EWSAA. Our decision in *Acree*, of course, renders the latter argument beyond the reach of the panel and Iraq makes it only to preserve it for rehearing by the court en banc. For the same reason, we do not address Iraq's further argument that the President has waived § 1083(c)(4) of the NDAA with respect to Iraq; even if the statute were waived, the panel would still be bound by *Acree*.

President's position that the threat of a monetary judgment against Iraq contravenes the foreign policy of the United States.

The federal courts may not pass upon a question the Constitution commits to the political branches. *See Baker v. Carr*, 369 U.S. 186, 217 (1962); *see also id.* at 211-13. In *Hwang Geum Joo v. Japan*, 413 F.3d 45 (D.C. Cir. 2005), for instance, foreign plaintiffs alleged that Japanese soldiers had subjected them to torture and sexual slavery in violation of international law. Japan and the plaintiffs debated whether the treaties between Japan and the countries from which the plaintiffs came extinguished their claims. We held the political branches alone could resolve that dispute because it "concerns the United States only with respect to her foreign relations." *Id.* at 51-52.

To be sure, the foreign policy considerations Iraq raises are important, as the President's actions and statements make clear. But Iraq has not explained how adjudicating the question whether Iraq committed acts of torture and hostage taking in 1990-91 requires the court to address any question the Constitution commits to the political branches. Indeed, Iraq does nothing more than assert that this action may affect the foreign relations of the United States, but that is surely not enough. *Baker*, 369 U.S. at 211 ("[I]t is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance"). The political question doctrine does not call upon us to decide whether a lawsuit that raises only justiciable questions contravenes the foreign policy of the United States; if the political branches decide tort suits against a foreign sovereign are contrary to the foreign policy of

the Nation, then they may by law remove them from our jurisdiction.

Nor has Iraq explained how the President, by making general statements or taking actions not specific to these cases, can set to naught a duly enacted jurisdictional statute. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634, 637-38 (1952) (Jackson, J., concurring) ("When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject."); *see also Altmann*, 541 U.S. at 702 (noting the FSIA "might well" require a court to defer to a statement of interest filed by the Department of State in a particular case). The Congress has given the courts of the United States the jurisdiction to decide the legal issues and factual questions raised by the plaintiffs' allegations, which sound in tort; accordingly the courts have the duty to proceed to the extent the actions are justiciable. *See Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) ("It is most true, that this court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction, if it should"). The present actions undoubtedly present questions fit for judicial determination under Article III—to wit, whether in 1990-91 Iraq committed the torts alleged—regardless whether their resolution might affect the foreign relations of the Nation.

III. Conclusion

In sum, we hold that neither § 1083 of the NDAA nor the President's waiver under § 1083(d) thereof deprives the courts of jurisdiction over these cases, which were pending under § 1605(a)(7) when the NDAA went into effect. Because the instant actions were timely filed and justiciable, we reverse the judgment of the district court and remand these cases to the district court for further proceedings consistent herewith.

So ordered.

APPENDIX Z

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 06-7175 ROBERT SIMON, ET AL., APPELLANTS v. REPUBLIC OF IRAQ, ET AL., APPELLEES Consolidated with 06-7178	**September Term, 2007** FILED ON: JUNE 24, 2008

Appeals from the United States District Court
for the District of Columbia
(No. 03cv00691)
(No. 03cv00888)

Before: SENTELLE, *Chief Judge*, and GINSBURG, and BROWN, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in these causes is hereby reversed and the cases are remanded for further proceedings, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/

Michael C. McGrail
Deputy Clerk

Date: June 24, 2008

Opinion for the court filed by Circuit Judge Ginsburg

APPENDIX AA

Foreign Assistance Act of 1961, Pub. L. 87-195, § 307, 75 Stat. 424 (1961), codified as amended at 22 U.S.C. § 2227

Sec. 307. Withholding of United States Proportionate Share for Certain Programs of International Organizations—(a) Notwithstanding any other provision of law, none of the funds authorized to be appropriated by this chapter shall be available for the United States proportionate share for programs for Burma, Iraq, North Korea, Syria, Libya, Iran, Cuba, or the Palestine Liberation Organization or for projects whose purpose is to provide benefits to the Palestine Liberation Organization or entities associated with it, or at the discretion of the President, Communist countries listed in section 620(f) of this Act.

(b) The Secretary of State—

(1) shall review, at least annually, the budgets and accounts of all international organizations receiving payments of any funds authorized to be appropriated by this chapter; and

(2) shall report to the appropriate committees of the Congress the amounts of funds expended by each such organization for the purposes described in subsection (a) and the amount contributed by the United States to each such organization.

(c)(1) Subject to paragraph (2), the limitations of sub-section (a) shall not apply to contributions to the

International Atomic Energy Agency or the United Nations Children's Fund (UNICEF).

(2)(A) Except as provided in subparagraph (B), with respect to funds authorized to be appropriated by this chapter and available for the International Atomic Energy Agency, the limitations of subsection (a) shall apply to programs or projects of such Agency in Cuba.

(B)(i) Subparagraph (A) shall not apply with respect to programs or projects of the International Atomic Energy Agency that provide for the discontinuation, dismantling, or safety inspection of nuclear facilities or related materials, or for inspections and similar activities designed to prevent the development of nuclear weapons by a country described in subsection (a).

(ii) Clause (i) shall not apply with respect to the Juragua Nuclear Power Plant near Cienfuegos, Cuba, or the Pedro Pi Nuclear Research Center unless Cuba—

(I) ratifies the Treaty on the Non-Proliferation of Nuclear Weapons (21 UST 483) or the Treaty for the Prohibition of Nuclear Weapons in Latin America (commonly known as the Treaty of Tlatelolco);

(II) negotiates full-scope safeguards of the International Atomic Energy Agency not later than two years after ratification by Cuba of such Treaty; and

(III) incorporates internationally accepted nuclear safety standards.

(d)(1) Notwithstanding subsection (c), if the Secretary of State determines that programs and

projects of the International Atomic Energy Agency in Iran are inconsistent with United States nuclear nonproliferation and safety goals, will provide Iran with training or expertise relevant to the development of nuclear weapons, or are being used as a cover for the acquisition of sensitive nuclear technology, the limitations of subsection (a) shall apply to such programs and projects, and the Secretary of State shall so notify the appropriate congressional committees (as defined in section 3 of the Foreign Relations Authorization Act, Fiscal Year 2003).

(2) A determination made by the Secretary of State under paragraph (1) shall be effective for the 1-year period beginning on the date of the determination.

APPENDIX AB

Foreign Assistance Act of 1961, Pub. L. 87-195, § 620A, 75 Stat. 424 (1961), codified as amended at 22 U.S.C. 2371

Sec. 620A. Prohibition on Assistance to Governments Supporting International Terrorism.

(a) PROHIBITION—The United States shall not provide any assistance under this Act, the Agricultural Trade Development and Assistance Act of 1954, the Peace Corps Act, or the Export-Import Bank Act of 1945 to any country if the Secretary of State determines that the government of that country has repeatedly provided support for acts of international terrorism.

(b) PUBLICATION OF DETERMINATIONS—Each determination of the Secretary of State under subsection (a), including each determination in effect on the date of the enactment of the Antiterrorism and Arms Export Amendments Act of 1989, shall be published in the *Federal Register*.

(c) RESCISSION—A determination made by the Secretary of State under subsection (a) may not be rescinded unless the President submits to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate—

(1) before the proposed rescission would take effect, a report certifying that—

(A) there has been a fundamental change in the leadership and policies of the government of the country concerned;

(B) that government is not supporting acts of international terrorism;

(C) that government has provided assurances that it will not support acts of international terrorism in the future; or

(2) at least 45 days before the proposed rescission would take effect, a report justifying the rescission and certifying that—

(A) the government concerned has not provided any support for international terrorism during the preceding 6-month period; and

(B) the government concerned has provided assurances that it will not support acts of international terrorism in the future.

(d) WAIVER—Assistance prohibited by subsection (a) may be provided to a country described in that subsection if—

(1) the President determines that national security interests or humanitarian reasons justify a waiver of subsection (a), except that humanitarian reasons may not be used to justify assistance under part II of this Act (including chapter 4, chapter 6, and chapter 8), or the Export-Import Bank Act of 1945; and

(2) at least 15 days before the waiver takes effect, the President consults with the Committee on Foreign Affairs of the House of Representatives and the Committee on Foreign Relations of the Senate regarding the proposed waiver and submits a report to the Speaker of the House of Representatives and

the chairman of the Committee on Foreign Relations of the Senate containing—

(A) the name of the recipient country;

(B) a description of the national security interests or humanitarian reasons which require the waiver;

(C) the type and amount of and the justification for the assistance to be provided pursuant to the waiver; and

(D) the period of time during which such waiver will be effective.

The waiver authority granted in this subsection may not be used to provide any assistance under the Foreign Assistance Act of 1961 which is also prohibited by section 40 of the Arms Export Control Act.

APPENDIX AC

IRAQ SANCTIONS ACT ("ISA") OF 1990

PUBLIC LAW 101-513 [H.R. 5114]
NOVEMBER 5, 1990
FOREIGN OPERATIONS, EXPORT FINANCING, AND RELATED PROGRAMS APPROPRIATIONS ACT

101 P.L. 513; 104 Stat. 1979; 1990 Enacted H.R. 5114; 101 Enacted H.R. 5114 SEC. 586.

SHORT TITLE.
Sections 586 through 586J of this Act may be cited as the "Iraq Sanctions Act of 1990".

SEC. 586A. DECLARATIONS REGARDING IRAQ'S INVASION OF KUWAIT.

The Congress—

(1) condemns Iraq's invasion of Kuwait on August 2, 1990;

(2) supports the actions that have been taken by the President in response to that invasion;

(3) calls for the immediate and unconditional withdrawal of Iraqi forces from Kuwait;

(4) supports the efforts of the United Nations Security Council to end this violation of international law and threat to international peace;

(5) supports the imposition and enforcement of multilateral sanctions against Iraq;

(6) calls on United States allies and other countries to support fully the efforts of the United Nations Security Council, and to take other appropriate actions, to bring about an end to Iraq's occupation of Kuwait; and

(7) condemns the brutal occupation of Kuwait by Iraq and its gross violations of internationally recognized human rights in Kuwait, including widespread arrests, torture, summary executions, and mass extrajudicial killings.

SEC. 586B. CONSULTATIONS WITH CONGRESS.

The President shall keep the Congress fully informed, and shall consult with the Congress, with respect to current and anticipated events regarding the international crisis caused by Iraq's invasion of Kuwait, including with respect to United States actions.

SEC. 586C. TRADE EMBARGO AGAINST IRAQ.

(a) CONTINUATION OF EMBARGO—Except as otherwise provided in this section, the President shall continue to impose the trade embargo and other economic sanctions with respect to Iraq and Kuwait that the United States is imposing, in response to Iraq's invasion of Kuwait, pursuant to Executive Orders Numbered 12724 and 12725 (August 9, 1990) and, to the extent they are still in effect, Executive Orders Numbered 12722 and 12723 (August 2, 1990). Notwithstanding any other

provision of law, no funds, credits, guarantees, or insurance appropriated or otherwise made available by this or any other Act for fiscal year 1991 or any fiscal year thereafter shall be used to support or administer any financial or commercial operation of any United States Government department, agency, or other entity, or of any person subject to the jurisdiction of the United states, for the benefit of the Government of Iraq, its agencies or Instrumentalities, or any person working on behalf of the Government of Iraq, contrary to the trade embargo and other economic sanctions imposed in accordance with this section.

(b) HUMANITARIAN ASSISTANCE—To the extent that transactions involving foodstuffs or payments for foodstuffs are exempted "in humanitarian circumstances" from the prohibitions established by the United States pursuant to United Nations Security Council Resolution 661 (1990), those exemptions shall be limited to foodstuffs that are to be provided consistent with United Nations Security Council Resolution 666 (1990) and other relevant Security Council resolutions.

(c) NOTICE TO CONGRESS OF EXCEPTIONS TO AND TERMINATION OF SANCTIONS—

(1) NOTICE OF REGULATIONS—Any regulations issued after the date of enactment of this Act with respect to the economic sanctions imposed with respect to Iraq and Kuwait by the United States under Executive Orders Numbered 12722 and 12723 (August 2, 1990) and Executive Orders Numbered 12724 and 12725 (August 9, 1990) shall be submitted to the Congress before those regulations take effect.

(2) NOTICE OF TERMINATION OF SANCTIONS—The President shall notify the Congress at least 15 days before the termination, in whole or in part, of any sanction imposed with respect to Iraq or Kuwait pursuant to those Executive orders.

(d) RELATION TO OTHER LAWS—

(1) SANCTIONS LEGISLATION—The sanctions that are described in subsection (a) are in addition to, and not in lieu of the sanctions provided for in section 586G of this Act or any other provision of law.

(2) NATIONAL EMERGENCIES AND UNITED NATIONS LEGISLATION—Nothing in this section supersedes any provision of the National Emergencies Act or any authority of the President under the International Emergency Economic Powers Act or section 5(a) of the United Nations Participation Act of 1945.

SEC. 586D. COMPLIANCE WITH UNITED NATIONS SANCTIONS AGAINST IRAQ.

(a) DENIAL OF ASSISTANCE—None of the funds appropriated or otherwise made available pursuant to this Act to carry out the Foreign Assistance Act of 1961 (including title IV of chapter 2 of part I, relating to the Overseas Private Investment Corporation) or the Arms Export Control Act may be used to provide assistance to any country that is not in compliance with the United Nations Security Council sanctions against Iraq unless the President determines and so certifies to the Congress that—

(1) such assistance is in the national interest of the United States;

(2) such assistance will directly benefit the needy people in that country; or

(3) the assistance to be provided will be humanitarian assistance for foreign nationals who have fled Iraq and Kuwait.

(b) IMPORT SANCTIONS—If the President considers that the taking of such action would promote the effectiveness of the economic sanctions of the United Nations and the United States imposed with respect to Iraq, and is consistent with the national interest, the President may prohibit, for such a period of time as he considers appropriate, the importation into the United States of any or all products of any foreign country that has not prohibited—

(1) the importation of products of Iraq into its customs territory, and

(2) the export of its products to Iraq.

SEC. 586E. PENALTIES FOR VIOLATIONS OF EMBARGO.

Notwithstanding section 206 of the International Emergency Economic Powers Act (50 U.S.C. 1705) and section 5(b) of the United Nations Participation Act of 1945 (22 U.S.C. 287c(b))—

(1) a civil penalty of not to exceed $ 250,000 may be imposed on any person who, after the date of enactment of this Act, violates or evades or attempts to violate or evade Executive Order Numbered 12722, 12723, 12724, or 12725 or any license, order, or regulation issued under any such Executive order; and

(2) whoever, after the date of enactment of this Act, willfully violates or evades or attempts to violate or evade Executive Order Numbered 12722, 12723, 12724, or 12725 or any license, order, or regulation issued under any such Executive order—

(A) shall, upon conviction, be fined not more than $1,000,000, if a person other than a natural person; or

(B) if a natural person, shall, upon conviction, be fined not more than $1,000,000, be imprisoned for not more than 12 years, or both. Any officer, director, or agent of any corporation who knowingly participates in a violation, evasion, or attempt described in paragraph (2) may be punished by imposition of the fine or imprisonment (or both) specified in subparagraph (B) of that paragraph.

SEC. 586F. DECLARATIONS REGARDING IRAQ'S LONG-STANDING VIOLATIONS OF INTERNATIONAL LAW.

(a) IRAQ'S VIOLATIONS OF INTERNATIONAL LAW—The Congress determines that—

(1) the Government of Iraq has demonstrated repeated and blatant disregard for its obligations under international law by violating the Charter of the United Nations, the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (done at Geneva, June 17, 1925), as well as other international treaties;

(2) the Government of Iraq is a party to the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social,

and Cultural Rights and is obligated under the Covenants, as well as the Universal Declaration of Human Rights, to respect internationally recognized human rights;

(3) the State Department's Country Reports on Human Rights Practices for 1989 again characterizes Iraq's human rights record as "abysmal";

(4) Amnesty International, Middle East Watch, and other independent human rights organizations have documented extensive, systematic, and continuing human rights abuses by the Government of Iraq, including summary executions, mass political killings, disappearances, widespread use of torture, arbitrary arrests and prolonged detention without trial of thousands of political opponents, forced relocation and deportation, denial of nearly all civil and political rights such as freedom of association, assembly, speech, and the press, and the imprisonment, torture, and execution of children;

(5) since 1987, the Government of Iraq has intensified its severe repression of the Kurdish minority of Iraq, deliberately destroyed more than 3,000 villages and towns in the Kurdish regions, and forcibly expelled more than 500,000 people, thus effectively depopulating the rural areas of Iraqi Kurdistan;

(6) Iraq has blatantly violated international law by initiating use of chemical weapons in the Iran- Iraq war;

(7) Iraq has also violated international law by using chemical weapons against its own Kurdish citizens, resulting in tens of thousands of deaths and more than 65,000 refugees;

(8) Iraq continues to expand its chemical weapons capability, and President Saddam Hussein has threatened to use chemical weapons against other nations;

(9) persuasive evidence exists that Iraq is developing biological weapons in violation of international law;

(10) there are strong indications that Iraq has taken steps to produce nuclear weapons and has attempted to smuggle from the United States, in violation of United States law, components for triggering devices used in nuclear warheads whose manufacture would contravene the Treaty on the Non-Proliferation of Nuclear Weapons, to which Iraq is a party; and

(11) Iraqi President Saddam Hussein has threatened to use terrorism against other nations in violation of international law and has increased Iraq's support for the Palestine Liberation Organization and other Palestinian groups that have conducted terrorist acts.

(b) HUMAN RIGHTS VIOLATIONS—The Congress determines that the Government of Iraq is engaged in a consistent pattern of gross violations of internationally recognized human rights. All provisions of law that impose sanctions against a country whose government is engaged in a consistent pattern of gross violations of internationally recognized human rights shall be fully enforced against Iraq.

(c) SUPPORT FOR INTERNATIONAL TERRORISM. —

(1) The Congress determines that Iraq is a country which has repeatedly provided support for acts of international terrorism, a country which grants sanctuary from prosecution to individuals or groups which have committed an act of international terrorism, and a country which otherwise supports international terrorism. The provisions of law specified in paragraph (2) and all other provisions of law that impose sanctions against a country which has repeatedly provided support for acts of international terrorism, which grants sanctuary from prosecution to an individual or group which has committed an act of International terrorism, or which otherwise supports international terrorism shall be fully enforced against Iraq.

(2) The provisions of law referred to in paragraph (1) are—

(A) section 40 of the Arms Export Control Act;

(B) section 620A of the Foreign Assistance Act of 1961;

(C) sections 555 and 556 of this Act (and the corresponding sections of predecessor foreign operations appropriations Acts); and

(D) section 555 of the International Security and Development Cooperation Act of 1985.

(d) MULTILATERAL COOPERATION—The Congress calls on the President to seek multilateral cooperation—

(1) to deny dangerous technologies to Iraq;

(2) to induce Iraq to respect internationally recognized human rights; and

(3) to induce Iraq to allow appropriate international humanitarian and human rights organizations to have access to Iraq and Kuwait, including the areas in northern Iraq traditionally inhabited by Kurds.

SEC. 586G. SANCTIONS AGAINST IRAQ.

(a) IMPOSITION—Except as provided in section 586H, the following sanctions shall apply with respect to Iraq:

(1) FMS SALES—The United States Government shall not enter into any sale with Iraq under the Arms Export Control Act.

(2) COMMERCIAL ARMS SALES—Licenses shall not be issued for the export to Iraq of any item on the United States Munitions List.

(3) EXPORTS OF CERTAIN GOODS AND TECHNOLOGY—The authorities of section 6 of the Export Administration Act of 1979 (50 U.S.C. App. 2405) shall be used to prohibit the export to Iraq of any goods or technology listed pursuant to that section or section 5(c)(1) of that Act (50 U.S.C. App. 2404(c)(1)) on the control list provided for in section 4(b) of that Act (50 U.S.C. App. 2403(b)).

(4) NUCLEAR EQUIPMENT, MATERIALS, AND TECHNOLOGY—

(A) NRC LICENSES—The Nuclear Regulatory Commission shall not issue any license or other authorization under the Atomic Energy Act of 1954 (42 U.S.C. 2011 and following) for the export to Iraq of any source or special nuclear material, any production or utilization facility, any sensitive nuclear technology, any component, item, or substance determined to have

significance for nuclear explosive purposes pursuant to section 109b. of the Atomic Energy Act of 1954 (42 U.S.C. 2139(b)), or any other material or technology requiring such a license or authorization.

(B) DISTRIBUTION OF NUCLEAR MATERIALS—The authority of the Atomic Energy Act of 1954 shall not be used to distribute any special nuclear material, source material, or byproduct material to Iraq.

(C) DOE AUTHORIZATIONS—The Secretary of Energy shall not provide a specific authorization under section 57b. (2) of the Atomic Energy Act of 1954 (42 U.S.C. 2077(b)(2)) for any activity that would constitute directly or indirectly engaging in Iraq in activities that require a specific authorization under that section.

(5) ASSISTANCE FROM INTERNATIONAL FINANCIAL INSTITUTIONS—The United States shall oppose any loan or financial or technical assistance to Iraq by international financial institutions in accordance with section 701 of the International Financial Institutions Act (22 U.S.C. 262d).

(6) ASSISTANCE THROUGH THE EXPORT-IMPORT BANK—Credits and credit guarantees through the Export-Import Bank of the United States shall be denied to Iraq.

(7) ASSISTANCE THROUGH THE COMMODITY CREDIT CORPORATION—Credit, credit guarantees, and other assistance through the Commodity Credit Corporation shall be denied to Iraq.

(8) FOREIGN ASSISTANCE—All forms of assistance under the Foreign Assistance Act of 1961 (22 U.S.C. 2151 and following) other than emergency assistance for medical supplies and other forms of emergency humanitarian assistance, and under the Arms Export Control Act (22 U.S.C. 2751 and following) shall be denied to Iraq.

(b) CONTRACT SANCTITY—For purposes of the export controls imposed pursuant to subsection (a)(3), the date described in subsection (m)(1) of section 6 of the Export Administration Act of 1979 (50 U.S.C. App. 2405) shall be deemed to be August 1, 1990.

SEC. 586H. WAIVER AUTHORITY.

(a) IN GENERAL—The President may waive the requirements of any paragraph of section 586G(a) if the President makes a certification under subsection (b) or subsection (c).

(b) CERTIFICATION OF FUNDAMENTAL CHANGES IN IRAQI POLICIES AND ACTIONS—The authority of subsection (a) may be exercised 60 days after the President certifies to the Congress that—

(1) the Government of Iraq—

(A) has demonstrated, through a pattern of conduct, substantial improvement in its respect for internationally recognized human rights;

(B) is not acquiring, developing, or manufacturing (i) ballistic missiles, (ii) chemical, biological, or nuclear weapons, or (iii) components for such weapons; has forsworn the first use of

such weapons; and is taking substantial and verifiable steps to destroy or otherwise dispose of any such missiles and weapons it possesses; and

(C) does not provide support for international terrorism;

(2) the Government of Iraq is in substantial compliance with its obligations under international law, including—

(A) the Charter of the United Nations;

(B) the International Covenant on Civil and Political Rights (done at New York, December 16, 1966) and the International Covenant on Economic, Social, and Cultural Rights (done at New York, December 16, 1966);

(C) the Convention on the Prevention and Punishment of the Crime of Genocide (done at Paris, December 9, 1948);

(D) the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (done at Geneva, June 17, 1925);

(E) the Treaty on the Non-Proliferation of Nuclear Weapons (done at Washington, London, and Moscow, July 1, 1968); and

(F) the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (done at Washington, London, and Moscow, April 10, 1972); and

(3) the President has determined that it is essential to the national interests of the United States to exercise the authority of subsection (a).

(c) CERTIFICATION OF FUNDAMENTAL CHANGES IN IRAQI LEADERSHIP AND POLICIES—The authority of subsection (a) may be exercised 30 days after the President certifies to the Congress that—

(1) there has been a fundamental change in the leadership of the Government of Iraq; and

(2) the new Government of Iraq has provided reliable and credible assurance that—

(A) it respects internationally recognized human rights and it will demonstrate such respect through its conduct;

(B) it is not acquiring, developing, or manufacturing and it will not acquire, develop, or manufacture (i) ballistic missiles, (ii) chemical, biological, or nuclear weapons, or (iii) components for such weapons; has forsworn the first use of such weapons; and is taking substantial and verifiable steps to destroy or otherwise dispose of any such missiles and weapons it possesses;

(C) it is not and will not provide support for international terrorism; and

(D) it is and will continue to be in substantial compliance with its obligations under international law, including all the treaties specified in subparagraphs (A) through (F) of subsection (b)(2).

(d) INFORMATION TO BE INCLUDED IN CERTIFICATIONS—Any certification under subsection (b) or (c) shall include the justification for each determination required by that subsection. The certification shall also specify which paragraphs of

section 586G(a) the President will waive pursuant to that certification.

SEC. 586I. DENIAL OF LICENSES FOR CERTAIN EXPORTS TO COUNTRIES ASSISTING IRAQ'S ROCKET OR CHEMICAL, BIOLOGICAL, OR NUCLEAR WEAPONS CAPABILITY.

(a) RESTRICTION ON EXPORT LICENSES—None of the funds appropriated by this or any other Act may be used to approve the licensing for export of any supercomputer to any country whose government the President determines is assisting, or whose government officials the President determines are assisting, Iraq to improve its rocket technology or chemical, biological, or nuclear weapons capability.

(b) NEGOTIATIONS—The President is directed to begin immediate negotiations with those governments with which the United States has bilateral supercomputer agreements, including the Government of the United Kingdom and the Government of Japan, on conditions restricting the transfer to Iraq of supercomputer or associated technology.

SEC. 586J. REPORTS TO CONGRESS.

(a) STUDY AND REPORT ON THE INTERNATIONAL EXPORT TO IRAQ OF NUCLEAR, BIOLOGICAL, CHEMICAL, AND BALLISTIC MISSILE TECHNOLOGY—

(1) The President shall conduct a study on the sale, export, and third party transfer or development of

nuclear, biological, chemical, and ballistic missile technology to or with Iraq including—

(A) an identification of specific countries, as well as companies and individuals, both foreign and domestic, engaged in such sale or export of, nuclear, biological, chemical, and ballistic missile technology;

(B) a detailed description and analysis of the international supply, information, support, and coproduction network, individual, corporate, and state, responsible for Iraq's current capability in the area of nuclear, biological, chemical, and ballistic missile technology; and

(C) a recommendation of standards and procedures against which to measure and verify a decision of the Government of Iraq to terminate the development, production, coproduction, and deployment of nuclear, biological, chemical, and offensive ballistic missile technology as well as the destruction of all existing facilities associated with such technologies.

(2) The President shall include in the study required by paragraph (1) specific recommendations on new mechanisms, to include, but not be limited to, legal, political, economic and regulatory, whereby the United States might contribute, in conjunction with its friends, allies, and the international community, to the management, control, or elimination of the threat of nuclear, biological, chemical, and ballistic missile proliferation.

(3) Not later than March 30, 1991, the President shall submit to the Committee on Appropriations and the Committee on Foreign Relations of the Senate and the Committee on Appropriations and

the Committee on Foreign Affairs of the House of Representatives, a report, in both classified and unclassified form, setting forth the findings of the study required by paragraph (1) of this subsection.

(b) STUDY AND REPORT ON IRAQ'S OFFENSIVE MILITARY CAPABILITY—

(1) The President shall conduct a study on Iraq's offensive military capability and its effect on the Middle East balance of power including an assessment of Iraq's power projection capability, the prospects for another sustained conflict with Iran, joint Iraqi-Jordanian military cooperation, the threat Iraq's arms transfer activities pose to United States allies in the Middle East, and the extension of Iraq's political-military influence into Africa and Latin America.

(2) Not later than March 30, 1991, the President shall submit to the Committee on Appropriations and the Committee on Foreign Relations of the Senate and the Committee on Appropriations and the Committee on Foreign Affairs of the House of Representatives, a report, in both classified and unclassified form, setting forth the findings of the study required by paragraph (1).

(c) REPORT ON SANCTIONS TAKEN BY OTHER NATIONS AGAINST IRAQ—

(1) The President shall prepare a report on the steps taken by other nations, both before and after the August 2, 1990, invasion of Kuwait, to curtail the export of goods, services, and technologies to Iraq which might contribute to, or enhance, Iraq's nuclear, biological, chemical, and ballistic missile capability.

(2) The President shall provide a complete accounting of international compliance with each of

the sanctions resolutions adopted by the United Nations Security Council against Iraq since August 2, 1990, and shall list, by name, each country which to his knowledge, has provided any assistance to Iraq and the amount and type of that assistance in violation of each United Nations resolution.

(3) The President shall make every effort to encourage other nations, in whatever forum or context, to adopt sanctions toward Iraq similar to those contained in this section.

(4) Not later than every 6 months after the date of enactment of this Act, the President shall submit to the Committee on Appropriations and the Committee on Foreign Relations of the Senate and the Committee on Appropriations and the Committee on Foreign Affairs of the House of Representatives, a report in both classified and unclassified form, setting forth the findings of the study required by paragraph (1) of this subsection.

APPENDIX AD

28 U.S.C. § 1605(a)(7) (repealed 2008)

Sec. 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

* * * * *

(7) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph—

(A) if the foreign state was not designated as a state sponsor of terrorism under section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)) or section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:00CV03110(EGS)

in the United States District Court for the District of Columbia; and

(B) even if the foreign state is or was so designated, if—

(i) the act occurred in the foreign state against which the claim has been brought and the claimant has not afforded the foreign state a reasonable opportunity to arbitrate the claim in accordance with accepted international rules of arbitration; or

(ii) neither the claimant nor the victim was a national of the United States (as that term is defined in section 101(a)(22) of the Immigration and Nationality Act) when the act upon which the claim is based occurred.

APPENDIX AE

National Defense Authorization Act for the Fiscal Year 2008, Pub. L. 110-181, § 1083, 122 Stat. 338 (2008)

SEC. 1083. TERRORISM EXCEPTION TO IMMUNITY.

(a) TERRORISM EXCEPTION TO IMMUNITY—

(1) IN GENERAL—Chapter 97 of title 28, United States Code, is amended by inserting after section 1605 the following:

"§ 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

"(a) IN GENERAL—

"(1) NO IMMUNITY—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

"(2) CLAIM HEARD—The court shall hear a claim under this section if—

"(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

"(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) was filed;

"(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

"(I) a national of the United States;

"(II) a member of the armed forces; or

"(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

"(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable

opportunity to arbitrate the claim in accordance with the accepted international rules of arbitration; or

"(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

"(b) LIMITATIONS—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208) not later than the latter of—

"(1) 10 years after April 24, 1996; or

"(2) 10 years after the date on which the cause of action arose.

"(c) PRIVATE RIGHT OF ACTION—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

"(1) a national of the United States,

"(2) a member of the armed forces,

"(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

"(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

"(d) ADDITIONAL DAMAGES—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

"(e) SPECIAL MASTERS—

"(1) IN GENERAL—The courts of the United States may appoint special masters to hear damage claims brought under this section.

"(2) TRANSFER OF FUNDS—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

"(f) APPEAL—In an action brought under this section, appeals from orders not conclusively ending the

litigation may only be taken pursuant to section 1292(b) of this title.

"(g) PROPERTY DISPOSITION.-

(1) IN GENERAL—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

"(A) subject to attachment in aid of execution, or execution, under section 1610;

"(B) located within that judicial district; and

"(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

"(2) NOTICE—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

"(3) ENFORCEABILITY—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

"(h) DEFINITIONS—For purposes of this section—

"(1) the term 'aircraft sabotage' has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

"(2) the term 'hostage taking' has the meaning given that term in Article 1 of the International Convention Against the Taking of Hostages;

"(3) the term 'material support or resources' has the meaning given that term in section 2339A of title 18;

"(4) the term 'armed forces' has the meaning given that term in section 101 of title 10;

"(5) the term 'national of the United States' has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

"(6) the term 'state sponsor of terrorism' means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

"(7) the terms 'torture' and 'extrajudicial killing' have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).".

(2) AMENDMENT TO CHAPTER ANALYSIS.- The table of sections at the beginning of chapter 97 of title 28, United States Code, is amended by inserting after the item relating to section 1605 the following:

"1605A. Terrorism exception to the jurisdictional immunity of a foreign state.".

(b) CONFORMING AMENDMENTS—

(1) GENERAL EXCEPTION—Section 1605 of title 28, United States Code, is amended—

(A) in subsection (a)—

(i) in paragraph (5)(B), by inserting "or" after the semicolon;

(ii) in paragraph (6)(D), by striking "; or" and inserting a period; and

(iii) by striking paragraph (7);

(B) by repealing subsections (e) and (f); and

(C) in subsection (g)(1)(A), by striking "but for subsection (a)(7)" and inserting "but for section 1605A".

(2) COUNTERCLAIMS.- Section 1607(a) of title 28, United States Code, is amended by inserting "or 1605A" after "1605".

(3) PROPERTY.- Section 1610 of title 28, United States Code, is amended—

(A) in subsection (a)(7), by striking "1605(a)(7)" and inserting "1605A";

(B) in subsection (b)(2), by striking "(5), or (7), or 1605(b)" and inserting "or (5), 1605(b), or 1605A";

(C) in subsection (f), in paragraphs (1)(A) and (2)(A), by inserting "(as in effect before the enactment of section 1605A) or section 1605A" after "1605(a)(7)"; and

(D) by adding at the end the following:

"(g) PROPERTY IN CERTAIN ACTIONS—

"(1) IN GENERAL—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

"(A) the level of economic control over the property by the government of the foreign state;

"(B) whether the profits of the property go to that government;

"(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

"(D) whether that government is the sole beneficiary in interest of the property; or

"(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

"(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

"(3) THIRD-PARTY JOINT PROPERTY HOLDERS—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.".

(4) VICTIMS OF CRIME ACT—Section 1404C(a)(3) of the Victims of Crime Act of 1984 (42 U.S.C. 10603c(a)(3)) is amended by striking "December 21, 1988 with respect to which an investigation or" and inserting "October 23, 1983, with respect to which an investigation or civil or criminal".

(c) APPLICATION TO PENDING CASES—

(1) IN GENERAL—The amendments made by this section shall apply to any claim arising under section 1605A of title 28, United States Code.

(2) PRIOR ACTIONS—

(A) IN GENERAL—With respect to any action that—

(i) was brought under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), before the date of the enactment of this Act,

(ii) relied upon either such provision as creating a cause of action,

(iii) has been adversely affected on the grounds that either or both of these provisions fail to create a cause of action against the state, and

(iv) as of such date of enactment, is before the courts in any form, including on appeal or motion under rule 60(b) of the Federal Rules of Civil Procedure,

that action, and any judgment in the action shall, on motion made by plaintiffs to the United States district court where the action was initially brought, or judgment in the action was initially entered, be given effect as if the action had originally been filed under section 1605A(c) of title 28, United States Code.

(B) DEFENSES WAIVED—The defenses of res judicata, collateral estoppel, and limitation period are waived-

(i) in any action with respect to which a motion is made under subparagraph (A), or

(ii) in any action that was originally brought, before the date of the enactment of this Act, under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), and is refiled under section 1605A(c) of title 28, United States Code, to the extent such defenses are based on the claim in the action.

(C) TIME LIMITATIONS—A motion may be made or an action may be refiled under subparagraph (A) only—

(i) if the original action was commenced not later than the latter of—

(I) 10 years after April 24, 1996; or

(II) 10 years after the cause of action arose; and

(ii) within the 60-day period beginning on the date of the enactment of this Act.

(3) RELATED ACTIONS—If an action arising out of an act or incident has been timely commenced under section 1605(a)(7) of title 28, United States Code, or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104-208), any other action arising out of the same act or incident may be brought under section 1605A of title 28, United States Code, if the action is commenced not later than the latter of 60 days after—

(A) the date of the entry of judgment in the original action; or

(B) the date of the enactment of this Act.

(4) PRESERVING THE JURISDICTION OF THE COURTS—Nothing in section 1503 of the Emergency Wartime Supplemental Appropriations Act, 2003 (Public Law 108-11, 117 Stat. 579) has ever authorized, directly or indirectly, the making inapplicable of any provision of chapter 97 of title 28, United States Code, or the removal of the jurisdiction of any court of the United States.

(d) APPLICABILITY TO IRAQ—

(1) APPLICABILITY—The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE—The authority under paragraph (1) shall apply—

(A) with respect to any conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

(4) SENSE OF CONGRESS—It is the sense of the Congress that the President, acting through the Secretary of State, should work with the Government of Iraq on a state-to-state basis to ensure compensation for any meritorious claims based on terrorist acts committed by the Saddam Hussein regime against individuals who were United States nationals or members of the United States Armed Forces at the time of those terrorist acts and whose claims cannot be addressed in courts in the United

States due to the exercise of the waiver authority under paragraph (1).

(e) SEVERABILITY—If any provision of this section or the amendments made by this section, or the application of such provision to any person or circumstance, is held invalid, the remainder of this section and such amendments, and the application of such provision to other persons not similarly situated or to other circumstances, shall not be affected by such invalidation.

APPENDIX AF

David DALIBERTI, et al., Plaintiffs,
v.
REPUBLIC OF IRAQ, Defendant.
No. CIV. A. 96-1118 (LFO).

United States District Court,
District of Columbia
May 25, 2001.

MEMORANDUM OPINION

OBERDORFER, District Judge.

Four male United States citizens and their spouses brought suit against the Republic of Iraq for injuries stemming from alleged acts of torture and hostage taking. Jurisdiction arises under 28 U.S.C. § 1605(a)(7). The defendant filed a motion to dismiss, which was denied by Judge Paul Friedman's Order of May 23, 2000. *Daliberti v. Republic of Iraq*, 97 F.Supp.2d 38 (D.D.C. 2000). Following the denial, defendant's counsel withdrew from the case, and the Clerk of Court entered a default against the defendant on October 16, 2000.

On November 9, 2000, plaintiffs moved for a default judgment. During a four-day ex parte bench trial, plaintiffs presented evidence to justify their judgment.[1] Plaintiffs testified in detail under oath in

[1] The plaintiffs and the Court made significant efforts to ensure proper notice to defendant of all proceedings. The

open court in response to questions from counsel and the Court. Based on the credible and necessarily uncontroverted material evidence presented at trial, judgment shall be entered for the plaintiffs.

I.

Following the conclusion of hostilities between the United States and the Republic of Iraq in 1991, the four male plaintiffs resided in Kuwait, working in various civilian capacities in and around the Kuwait-Iraqi border. Clinton Hall worked clearing the desert of mines and munitions from the Kuwait side of the demilitarized zone. Kenneth Beaty was an oil rig drilling supervisor. David Daliberti and William Barloon worked together, for different employers, maintaining and overhauling aircraft in Kuwait. Although some of the plaintiffs had military experience prior to living in Kuwait, they lived and worked in Kuwait as civilians. Beginning in 1992, in separate incidents, each male plaintiff was taken into custody by Iraq government employees, and held captive in Iraq. Clinton Hall was held in Iraq for five days. David Daliberti and William Barloon, taken

---

plaintiffs sent their pretrial brief to the Iraqi Interests Section, care of the Embassy of Algeria; it was returned stamped "refused." Pls.' Ex. 26. The Clerk of Court also effected diplomatic service, via the United States Department of State, of orders and memoranda generated by the Court. *See Daliberti v. Republic of Iraq*, Civ. No. 96-1118 (docket entry of March 2, 2001); Tr. 271-73. Defendant was given every possible opportunity to participate meaningfully in the trial. In the absence of defense counsel, the Court used particular care to draw the following findings of fact and conclusions of law from admissible testimony in accordance with the Federal Rules of Evidence.

and imprisoned together, were held for 126 days. Kenneth Beaty was held the longest, for 205 days.

At trial, each of the former prisoners testified in detail about the conditions of their capture and confinement and the physical and psychological effect of their experience on them. Plaintiffs also presented two expert witnesses, by video deposition, to support their claims for damages. Dr. William Reid, a psychiatrist, testified that each plaintiff suffered palpable psychological damage stemming from the events related by the plaintiffs. Dr. Reid is currently a professor of psychiatry at the University of Texas Health Science Center and has authored numerous articles and books, including an article dealing specifically with victims of terrorism and hostage situations. Pls.' Ex. 4. Dr. Reid's academic background and experience, particularly his significant experience in evaluating and treating former hostages, qualify him to offer expert testimony as to the plaintiffs' mental and emotional injuries. Dr. Barry Wilbratte testified to the economic impact of the captivity on plaintiffs, specifically, their loss of past and future wages. Dr. Wilbratte holds a Ph.D. in economics from Tulane University and is the Chair of the Department of Economics at the University of St. Thomas. Pls.' Ex. 5. In federal and state courts, Dr. Wilbratte has testified about litigants' wage loss. His education and experience qualify him to testify as an expert in this case. Dr. Wilbratte considered the difference between plaintiffs' earnings from employment overseas at the time of their seizure and their diminished earnings from employment in the United States, taking into account various economic factors.

II.

Clinton Hall

On the morning of October 6, 1992, Clinton Hall was supervising his crew south of the Iraqi-Kuwait border. Hall and his crew were working inside Kuwaiti territory, the border having been clearly marked with concrete markers and steel rods with flags. Hall noticed an Iraqi patrol nearing his crew, and approached them, with a United Nations officer, to inform them that they were inside the Kuwait border. The Iraqi guards insisted that Hall was inside the Iraqi border and took him into custody at gunpoint, driving him first to Basra and then to Baghdad. Tr. 101-112. The Iraqis released Hall after five days in captivity. Tr. 150.

During Hall's confinement, he lived in a small prison cell with no lights, window, water, or toilet. He was frequently denied food and water, and had only limited access to any toilet facilities. Tr. 129. Iraqi guards or officers interrogated him, in the process accusing him of espionage. At times they threatened him with physical torture, such as cutting off his fingers, pulling out his fingernails, or shocking him electrically in his testicles. He was in constant fear that he would be killed or suffer serious bodily harm. Tr. 119-122.

Kenneth Beaty

On April 25, 1993, Kenneth Beaty was traveling in Kuwait, on his way to an oil rig owned by his employer, which was located within sight of the Iraqi-Kuwait border. He stopped at an Iraqi border checkpoint and displayed his credentials to the Iraqi border guards. The guards detained him at gunpoint

and then drove him to Basra, Iraq, and later to Baghdad. While he was being transported, he was often blindfolded and held at gunpoint. Tr. 22-25.

In Baghdad, he was initially confined in a car park, converted into a prison, in a cell that had no water or toilet, and only a steel cot for a bed. Tr. 28, 32-33. After 11 days, Beaty stood trial in Iraq for espionage, and although the Iraqi court found him not guilty of espionage, it later found him guilty of illegal entry into Iraq. Beaty was sentenced to 7 or 8 years in prison, and transferred to Abu Ghreib prison in Baghdad. Tr. 36-41. There, he lived in a cell infested with vermin and shared a toilet with more than 200 other prisoners. He suffered from a heart condition but was denied adequate medical attention and medication while in prison. Tr. 44-51.

While Beaty was incarcerated, his wife, Robin, undertook to secure his release. To that end, she spoke with Iraqi officials, including the Iraqi Ambassador to the United Nations Nizar Hamdoon, and with United Nations Secretary General Boutros Boutros-Ghali. Her conversations with them established that Iraq sought either a lifting of the economic sanctions imposed by the United States or a significant humanitarian gift in exchange for her husband's release. Tr. 82-87. She succeeded in raising $5,000,000 worth of prescription medicine, water purification equipment, and other medical goods, all exempt from the sanctions or embargo, to be delivered to Iraq. Tr. 87-88. She also persuaded prominent American citizens, including former President Jimmy Carter, to write letters to Iraqi officials in support of Beaty's release. Pls.' Ex. 1.

Another prominent supporter, Senator David Boren of Oklahoma, contacted Ambassador Hamdoon

to open a dialogue regarding Beaty's release. The Senator's conversations with Iraqi officials confirmed that Iraq was holding Beaty in order to exact a price for his release, either in the form of humanitarian aid or the lifting of sanctions. Deposition of Senator David Boren ("Boren Tr."), March 17, 1997, 12-13 (Pls.' Ex. 7-F). Ambassador Hamdoon eventually informed the Senator that if he traveled to Baghdad personally, Iraq would release Beaty into his custody. Boren Tr. 15. Robin Beaty delivered the medical package she had assembled. Senator Boren himself traveled to Baghdad to support her efforts. On November 14, 1993, 205 days after Iraq initially detained Beaty, Iraq released him into Senator Boren's custody. Tr. 66-67.

David Daliberti and William Barloon

On March 13, 1995, David Daliberti and William Barloon were traveling in Kuwait when they mistakenly ventured across the border into Iraq. Iraqi guards seized them at gunpoint, despite the presence and protests of United Nations officials, and took them to Basra, Iraq. Tr. 179-181. The United Nations report on the incident, although it faulted the plaintiffs' judgment, nonetheless determined that the conduct of the Iraqi guards was unacceptable. United Nations Border Crossing Incident Report, June 14, 1995 (Pls.' Ex. 21). Daliberti and Barloon were taken to Baghdad, where, on trial for illegal entry into the country, an Iraqi court convicted them of that offense and sentenced each of them to 8 years in prison. They were transferred to Abu Ghreib prison in Baghdad. Tr. 197-200.

During their captivity, both initially and after they were sentenced, Daliberti and Barloon were in constant fear for their lives. They observed that their captors displayed little respect for human life. At one point, an Iraqi guard attempted to execute Barloon, but was stopped by another guard. In another incident, the vehicle transporting Daliberti struck a pedestrian at high speed, yet failed to stop. Tr. 185-188. They frequently heard other prisoners being beaten, and feared being beaten themselves. Tr. 192, 198. They suffered at times from serious medical problems while in prison, but were never promptly or adequately treated. Tr. 191-204. On a visit to the prison, Kathy Daliberti and Linda Barloon observed that their husbands had lost weight and appeared to be hopeless and despondent. Tr. 206-207, 219-220, 287-290. Like the other plaintiffs, Daliberti and Barloon were not given sufficient food, water or access to toilet facilities. Tr. 191.

During their confinement, then Congressman William Richardson entered into discussions with Ambassador Hamdoon to obtain their release. Deposition of William Richardson ("Richardson Tr."), June 26, 2000 (Pls.' Ex. 7G-2). Congressman Richardson concluded, as in the case of Kenneth Beaty, that the Iraqi government was holding Daliberti and Barloon as leverage to exact concessions from the United States government, or to obtain humanitarian aid. Congressman Richardson traveled to Iraq to meet with Ambassador Hamdoon and Saddam Hussein, who confirmed that Iraq sought tangible benefits, such as aid or the easing of sanctions, in exchange for plaintiffs' release. Richardson Tr. 11-14. Ultimately, although there is no evidence that the United States provided any

such relief, Iraq released Daliberti and Barloon into the custody of Congressman Richardson, after holding them for a total of 126 days.

III.

Although the plaintiffs were taken and held in separate incidents and for varying lengths of time, each has suffered remarkably similar effects. Hall, Beaty, Daliberti and Barloon have each been diagnosed with post traumatic stress disorder. Following their release, they exhibited marked changes in personality, such as anger, feelings of detachment and isolation, nightmares, and insomnia. Each plaintiff has suffered significant damage to his marriage and has ongoing problems with intimacy and personal relationships. According to the testimony of Dr. Reid, these men will experience these effects for the rest of their lives.[2]

Because of their psychological damage, none of the male plaintiffs was able to continue working overseas. Although some of the plaintiffs attempted more aggressively than others to return to overseas work, each plaintiff eventually returned to the United States. Tr. 69-70, 150-153, 213-214, 277-280. Feelings of isolation and fear prevented any of them from maintaining their more lucrative overseas positions, and each has suffered financial loss because of the inability and unwillingness to do so. Dr. Wilbratte's testimony established that the male

---

[2] Dr. Reid testified to these conclusions in specific detail about each plaintiff. Deposition of Dr. William Reid ("Reid Tr."), March 16, 2001. He also prepared individual reports for each male plaintiff which detail his findings. Pls.' Exs. 17a, c-e.

plaintiffs' past and future wage loss (reduced to present value) is as follows:

Plaintiff	Past wage loss	Future wage loss
Clinton Hall	$1,037,897	$ 709,107
Kenneth Beaty	$ 723,326	$1,462,115
William Barloon	$ 526,323	$1,155,962
David Daliberti	$ 710,104	$1,878,455

Deposition of Barry Wilbratte, Ph.D., February 21, 2001; *see also* Plaintiffs' Pretrial Brief & Attached Exhibits.

The testimony of the spouse plaintiffs, supported by Dr. Reid's expert opinion, demonstrated that they have also suffered since their husbands' seizure. The psychological damage to the husbands, in each case, caused an immediate and severe deterioration of the marital relationship. The wives testified that before their husbands' capture they had been in satisfactory marriages that gave them love, companionship, and support; after their husbands returned, their marriages became strained and distant. Tr. 89-90, 163-169, 214-223, 281-295. The Halls have divorced, and the Barloons are separated. Kenneth Beaty testified that, although he and his wife are still together, they are more "like roommates" than spouses. The Dalibertis' marriage has suffered similar effects.

IV.

The foregoing findings of fact lead to the following conclusions of law. The Foreign Sovereign Immunities Act (FSIA) exempts from immunity foreign sovereigns where "money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources ... for such an act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency ...." 28 U.S.C. § 1605(a)(7).

The FSIA adopts the definitions of hostage taking and torture used in the International Convention Against the Taking of Hostages, and the Torture Victim Protection Act of 1991, respectively. *Id.* § 1605(e). Torture is defined as

> any act, directed against an individual in the offender's custody, by which severe pain or suffering (other than pain and suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind.

Section 3(b)(1), Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 Note. Hostage taking is defined as follows:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages within the meaning of this Convention.

34 U.N. GAOR Supp. No. 46, at 245 (TIAS 11081). The Secretary of State of the United States designated defendant Republic of Iraq as a state sponsor of terrorism pursuant to Section 6(j) of the Export Administration Act of 1979 on September 13, 1990. 55 Fed. Reg. 37793-01.

The FSIA, as amended, provides liability for "money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7)." Pub. L. 104-208, Div A, Title I § 101(c) [Title V, § 589], 110 Stat. 3009-172, codified at 28 U.S.C. § 1605 note.

The treatment of Clinton Hall by employees or agents of defendant, as detailed above, including holding him at gunpoint, threatening to injure him physically if he did not confess to espionage or otherwise provide information, and incarcerating him in a room with no bed, window, light, electricity,

water, toilet or adequate access to sanitary facilities, constituted torture as defined by the FSIA. The defendant likewise tortured Kenneth Beaty, David Daliberti and William Barloon, as detailed in the foregoing findings, by committing acts such as placing loaded guns to their heads, depriving them of medical treatment, and incarcerating them in an environment without adequate toilet facilities. Defendant also detained plaintiffs Kenneth Beaty, David Daliberti, and William Barloon in an attempt to condition their release on the receipt of humanitarian aid and/or the lifting of sanctions or the United Nations embargo. In doing so, defendant committed the FSIA offense of hostage taking. The FSIA entitles plaintiffs Clinton Hall, Kenneth Beaty, David Daliberti and William Barloon to compensation for their mental and physical suffering—during their incarceration, since their release, and in the future—and for their wage loss and other damages. Similarly, plaintiffs Elizabeth Hall, Robin Beaty, Kathy Daliberti, and Linda Barloon, are entitled to compensation for the damages, including loss of solatium and pain and suffering, that they suffered as a result of the actions of the defendant.

Plaintiffs seeks damages in excess of $100,000,000. These include past and future wage loss for the male plaintiffs, $10,000 per day for each day they were incarcerated, and damages for past and future pain and suffering, calculated on a per day basis according to each plaintiff's life expectancy. In addition, each spouse plaintiff seeks $10,000,000 for solatium. In reaching an appropriate damages award, earlier decisions awarding damages under the FSIA against foreign sovereigns for torture and

hostage taking served as a benchmark. The Court considered the amounts awarded in those cases in light of the similarities and differences in the facts of each case. Beginning in 1985, Terry Anderson, David Jacobsen, Joseph Cicippio, and Frank Reed were held hostage in Iran. They were awarded, approximately, $10,000 per day for each day they were incarcerated, in addition to any lost wages they suffered. *Cicippio v. Islamic Republic of Iran,* 18 F.Supp.2d 62 (D.D.C. 1998); *Anderson v. Islamic Republic of Iran,* 90 F. Supp. 2d 107 (D.D.C. 2000). The *Anderson* and *Cicippio* cases represent the most extreme examples of torture and inhumane incarceration, where the daily conditions to which the prisoners were subjected make their survival remarkable. The experiences of the male plaintiffs here, while brutal and life-changing, were not so severe. The contrast considered, the amount awarded to the *Anderson* and *Cicippio* plaintiffs, $10,000 per day of incarceration, is reasonable and appropriate in this case. This amount alone, without a separate award for pain and suffering, is sufficient to compensate the male plaintiffs for both the suffering inflicted by the captivity itself, and for the psychological injuries experienced by them following their release. The following sets forth the time spent in incarceration and the compensation to which of them is entitled.

Kenneth Beaty	205 days in prison	$2,050,000.00
Clinton Hall	5 days in prison	$ 50,000.00
David Daliberti	126 days in prison	$1,260,000.00
William Barloon	126 days in prison	$1,260,000.00

Plaintiffs Clinton Hall, Kenneth Beaty, David Daliberti and William Barloon also deserve compensation for their loss of wages to date and the present value of their projected future wage loss, as calculated by Dr. Wilbratte and set forth above, including appropriate assumptions as to inflation, rise in productivity, job advancement, personal consumption and net earnings. *See Flatow v. Islamic Republic of Iran,* 999 F. Supp. 1, 27 (D.D.C. 1998). The Court has considered the duty of plaintiffs to mitigate their damages. Each plaintiff suffered psychological damage that made it difficult, if not impossible, to continue in the same type of overseas work that he had engaged in prior to his incarceration. The plaintiffs presented expert psychiatric testimony to support a conclusion that they have each made reasonable efforts to mitigate their damages to the extent possible, and that their failure to earn wages at previous levels is consistent with their psychological injuries.

The spouse plaintiffs are entitled to an award of damages for loss of the society and companionship of their husbands as a result of defendant's actions. Again, the *Anderson* and *Cicippio* cases serve as useful guidance; each spouse was awarded $10,000,000 for solatium. In those cases, the spouses lived for years while their husbands were in captivity, "never knowing if their husbands were being tortured or were even still alive." *Cicippio,* 18 F.Supp.2d at 70. In the case of Terry Anderson's wife, she gave birth to their daughter and raised her for approximately six years without her husband. *Anderson,* 90 F. Supp. 2d at 111. Taking into account the length of time that the spouse plaintiffs were without the companionship and support of their

husbands during their captivity, the degree of severity of their husbands' treatment, and the damage to their marriages and the suffering they have experienced since their husbands were released, Robin Beaty, Elizabeth Hall, Kathy Daliberti and Linda Barloon will each be awarded damages in the amount of $1,500,000.

To summarize, the total compensatory damages awards for all plaintiffs are as follows:

Kenneth Beaty:	$4,235,441
Robin Beaty	$1,500,000
Clinton Hall	$1,797,004
Elizabeth Hall	$1,500,000
William Barloon	$2,942,285
Linda Barloon	$1,500,000
David Daliberti	$3,848,559
Kathy Daliberti	$1,500,000

. . . . . .

An accompanying Order implements the decisions announced herein.

ORDER AND JUDGMENT

For the reasons stated in the accompanying Memorandum, it is this 25th day of May, 2001, hereby

ORDERED: that judgment is entered on behalf of plaintiffs Kenneth Beaty, Clinton Hall, William

Barloon, and David Daliberti, against defendant, Republic of Iraq, in the total amount of $12,823,289.00, allocated as follows: to Kenneth Beaty, $4,235,441.00; to Clinton Hall, $1,797,004.00; to William Barloon, $2,942,285.00; to David Daliberti, $3,848,559; and it is further

ORDERED: that judgment is entered on behalf of the spouse plaintiffs Robin Beaty, Elizabeth Hall, Linda Barloon, and Kathy Daliberti, against defendant, Republic of Iraq, for solatium, in the total amount of $6,000,000.00, to be allocated in the amount of $1,500,000.00 to each spouse; and it is further

ORDERED: that the Clerk of Court shall cause a copy of this Order and Judgment and the accompanying Memorandum to be translated into Arabic, with the costs of translation to be paid by the plaintiffs, and transmitted to the United States Department of State for diplomatic service on the defendant in accordance with the provisions of 28 U.S.C. § 1608(a)(4), and to the Iraqi Interests Section, care of the Embassy of Algeria, 1801 P Street, N.W., Washington, D.C. 20036.

APPENDIX AG

Presidential Determination No. 2003-23 of May 7, 2003

Suspending the Iraq Sanctions Act, Making Inapplicable Certain Statutory Provisions Related to Iraq, and Delegating Authorities, under the Emergency Wartime Supplemental Appropriations Act, 2003

Memorandum for the Secretary of State [and] the Secretary of Commerce

By virtue of the authority vested in me by the Constitution and the laws of the United States, including sections 1503 and 1504 of the Emergency Wartime Supplemental Act, 2003, Public Law 108-11 (the "Act"), and section 301 of title 3, United States Code, I hereby:

(1) suspend the application of all of the provisions, other than section 586E, of the Iraq Sanctions Act of 1990, Public Law 101-513, and

(2) make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended (the "FAA"), and any other provision of law that applies to countries that have supported terrorism.

In addition, I delegate the functions and authorities conferred upon the President by:

(1) section 1503 of the Act to submit reports to the designated committees of the Congress to the Secretary of Commerce, or until such time as the principal licensing responsibility for the export to Iraq of items on the Commerce Control List has reverted to the Department of Commerce, to the Secretary of the Treasury; and,

(2) section 1504 of the Act to the Secretary of State.

The functions and authorities delegated herein may be further delegated and redelegated to the extent consistent with applicable law.

The Secretary of State is authorized and directed to publish this determination in the *Federal Register.*

GEORGE W. BUSH
THE WHITE HOUSE,
Washington, May 7, 2003.

APPENDIX AH

Executive Order 13303 of May 22, 2003

Protecting the Development Fund for Iraq and Certain Other Property in Which Iraq Has an Interest

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act, as amended (50 U.S.C. 1701 *et seq.*) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 *et seq.*), section 5 of the United Nations Participation Act, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code,

I, GEORGE W. BUSH, President of the United States of America, find that the threat of attachment or other judicial process against the Development Fund for Iraq, Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, obstructs the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in the country, and the development of political, administrative, and economic institutions in Iraq. This situation constitutes an unusual and extraordinary threat to the national security and

foreign policy of the United States and I hereby declare a national emergency to deal with that threat.

I hereby order:

Section 1. Unless licensed or otherwise authorized pursuant to this order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to the following:

(a) the Development Fund for Iraq, and

(b) all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein, in which any foreign country or a national thereof has any interest, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons.

Sec. 2. (a) As of the effective date of this order, Executive Order 12722 of August 2, 1990, Executive Order 12724 of August 9, 1990, and Executive Order 13290 of March 20, 2003, shall not apply to the property and interests in property described in section 1 of this order.

(b) Nothing in this order is intended to affect the continued effectiveness of any rules, regulations, orders, licenses or other forms of administrative action issued, taken, or continued in effect heretofore or hereafter under Executive Orders 12722, 12724, or 13290, or under the authority of IEEPA or the

UNPA, except as hereafter terminated, modified, or suspended by the issuing Federal agency and except as provided in section 2(a) of this order.

Sec. 3. For the purposes of this order:

(a) The term "person" means an individual or entity;

(b) The term "entity" means a partnership, association, trust, joint venture, corporation, group, subgroup, or other organization;

(c) The term "United States person" means any United States citizen, permanent resident alien, entity organized under the laws of the United *31932 States or any jurisdiction within the United States (including foreign branches), or any person in the United States;

(d) The term "Iraqi petroleum and petroleum products" means any petroleum, petroleum products, or natural gas originating in Iraq, including any Iraqi-origin oil inventories, wherever located; and

(e) The term "Development Fund for Iraq" means the fund established on or about May 22, 2003, on the books of the Central Bank of Iraq, by the Administrator of the Coalition Provisional Authority responsible for the temporary governance of Iraq and all accounts held for the fund or for the Central Bank of Iraq in the name of the fund.

Sec. 4. (a) The Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Defense, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA and the UNPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of

these functions to other officers and agencies of the United States Government. All agencies of the United States Government are hereby directed to take all appropriate measures within their statutory authority to carry out the provisions of this order.

(b) Nothing contained in this order shall relieve a person from any requirement to obtain a license or other authorization in compliance with applicable laws and regulations.

Sec. 5. This order is not intended to, and does not, create any right, benefit, or privilege, substantive or procedural, enforceable at law or in equity by a party against the United States, its departments, agencies, entities, officers, employees, or agents, or any other person.

Sec. 6. This order shall be transmitted to the Congress and published in the *Federal Register*.

GEORGE W. BUSH
THE WHITE HOUSE,
May 22, 2003.

APPENDIX AI

Message to the Congress Reporting the Declaration of a National Emergency With Respect to the Development Fund for Iraq

May 22, 2003

To the Congress of the United States:

Consistent with section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(b) (IEEPA), section 5 of the United Nations Participation Act (22 U.S.C. 287c) (UNPA), and section 301 of the National Emergencies Act, 50 U.S.C. 1631, I hereby report that I have exercised my authority to declare a national emergency to deal with the unusual and extraordinary threat posed to the national security and foreign policy of the United States by the threat of attachment or other judicial process against the Development Fund for Iraq, Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale or marketing thereof, and interests therein.

A major national security and foreign policy goal of the United States is to ensure that the newly established Development Fund for Iraq and other Iraqi resources, including Iraqi petroleum and petroleum products, are dedicated for the well-being of the Iraqi people, for the orderly reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, for the costs of indigenous

civilian administration, and for other purposes benefiting the people of Iraq. The Development Fund for Iraq and other property in which Iraq has an interest may be subject to attachment, judgment, decree, lien, execution, garnishment, or other judicial process, thereby jeopardizing the full dedication of such assets to purposes benefiting the people of Iraq. To protect these assets, I have ordered that, unless licensed or otherwise authorized pursuant to my order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process is prohibited, and shall be deemed null and void, with respect to the following:

(a) the Development Fund for Iraq, and

(b) all Iraqi petroleum and petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale and marketing there of, and interests therein, in which any foreign country or a national thereof has any interest, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons.

In addition, by my memorandum to the Secretary of State and Secretary of Commerce of May 7, 2003 (Presidential Determination 2003-23), I made inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended, and any other provision of law that applies to countries that have supported terrorism. Such provisions of law that apply to countries that have supported terrorism include, but are not limited to, 28 U.S.C. 1605(a)(7), 28 U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act.

I also have ordered that Executive Order 12722 of August 2, 1990, and Executive Order 12724 of August 9, 1990, which blocked property and interests in property of the Government of Iraq, its agencies, instrumentalities and controlled entities and the Central Bank of Iraq that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, including their overseas branches, and Executive Order 13290 of March 20, 2003, which confiscated and vested certain Government of Iraq accounts, shall not apply to the Development Fund for Iraq or to Iraqi petroleum or petroleum products, and interests therein, and proceeds, obligations, or any financial instruments of any nature whatsoever arising from or related to the sale and marketing thereof, and interests therein.

I have delegated to the Secretary of the Treasury, in consultation with the Secretary of State and the Secretary of Defense, the authority to take such actions as may be necessary to carry out the purposes of the Executive Order, including the promulgation of rules and regulations. I have also authorized the Secretary of the Treasury to employ all powers granted to the President by IEEPA and UNPA to carry out the purposes of the Executive Order. I am enclosing a copy of the Executive Order I have issued.

George W. Bush
The White House,
May 22, 2003.

APPENDIX AJ

Letter to Congressional Leaders Reporting on Blocking Property of the Former Iraqi Regime, Its Senior Officials and Their Family Members, and Taking Certain Other Actions

August 28, 2003

Dear Mr. Speaker: (Dear Mr. President:)

Consistent with section 204(b) of the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. 1703(b), and section 301 of the National Emergencies Act, 50 U.S.C. 1631, I hereby report that I have exercised my authority to expand the scope of the national emergency declared in Executive Order 13303 of May 22, 2003, to address the unusual and extraordinary threat to the national security and foreign policy of the United States posed by obstacles to the orderly reconstruction of Iraq, the restoration and maintenance of peace and security in that country, and the development of political, administrative, and economic institutions in Iraq.

In United Nations Security Council Resolution (UNSCR) 1483 of May 22, 2003, the U.N. Security Council decided that U.N. member states shall freeze the assets of the former Iraqi regime, Saddam Hussein, and other senior officials of the former Iraqi regime, and their immediate family members and cause the transfer of those assets to the Development Fund for Iraq. The assets of the former Iraqi regime, Saddam Hussein, and other senior Iraqi officials have

already been frozen pursuant to the Iraqi Sanctions Regulations, 31 C.F.R. part 575, which implemented the 1990 Executive Orders that imposed economic sanctions with respect to Iraq. The order that I have now issued broadens the scope of persons whose assets may be frozen under those orders by adding the immediate family members of former Iraqi senior officials whose assets may be frozen. This order also allows for the confiscating and vesting of some of those assets and provides for the transfer of all vested assets to the Development Fund for Iraq in a manner consistent with paragraph 23 of UNSCR 1483. The Development Fund for Iraq will be used by the Coalition Provisional Authority in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, for the costs of Iraqi civilian administration, and for other purposes benefiting the Iraqi people. By this order and related measures, the United States Government is implementing the requirements of paragraph 23 of UNSCR 1483.

Among other measures, unless licensed or otherwise authorized pursuant to this order, any attachment, judgment, decree, lien, execution, garnishment, or other judicial process with respect to assets blocked pursuant to this order is prohibited by section 1 of this order. I further note that Presidential Determination No. 2003-23 issued on May 7, 2003, made inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961, Public Law 87-195, as amended, and any other provision of law that applies to countries that have supported terrorism, including, but not limited to, 28 U.S.C. 1605(a)(7), 28

U.S.C. 1610, and section 201 of the Terrorism Risk Insurance Act.

I have ordered that all property and interests in property of the former Iraqi regime or its state bodies, corporations, or agencies, or of the following persons, that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in:

(a) the persons listed in the Annex to this order; and

(b) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State,

(i) to be senior officials of the former Iraqi regime or their immediate family members; or

(ii) to be owned or controlled by, or acting or purporting to act for or on behalf of, directly or indirectly, any of the persons listed in the Annex to this order or determined to be subject to this order.

I have authorized the Secretary of the Treasury, in consultation with the Secretary of State, to confiscate property that is blocked pursuant to this order and that he determines, in consultation with the Secretary of State, to belong to a person, organization, or country that has planned, authorized, aided, or engaged in armed hostilities against the United States. All right, title, and interest in any property so confiscated shall vest in the Department of the Treasury and shall promptly be transferred to the Development Fund for Iraq.

I have delegated to the Secretary of the Treasury, in consultation with the Secretary of State, the authority to take such actions as may be necessary to carry out the purposes of my order, including the promulgation of rules and regulations. I have also authorized the Secretary of the Treasury, in consultation with the Secretary of State, to employ all powers granted to me by IEEPA and by section 5 of the United Nations Participation Act, 22 U.S.C. 287c, to carry out the purposes of this order.

I am enclosing a copy of the executive order I have issued. The order is effective at 12:01 a.m. EDT on August 29, 2003.

Sincerely,

George W. Bush

* * * * *

APPENDIX AK

S. Con. Res. 61 Agreed to December 19, 2007

One Hundred Tenth Congress
of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday,
the fourth day of January, two thousand and seven

Concurrent Resolution

Resolved by the Senate (the House of Representatives concurring), That when the Senate recesses or adjourns on any day from Tuesday, December 18, 2007, through Monday, December 31, 2007, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it stand adjourned sine die, or until such day and time as may be specified in the motion to recess or adjourn, or until the time of any reassembly pursuant to section 3 of this concurrent resolution, whichever occurs first; and that when the House adjourns on any legislative day from Tuesday, December 18, 2007, through Saturday, December 22, 2007, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it stand

adjourned sine die, or until the time of any reassembly pursuant to section 3 of this concurrent resolution.

SEC. 2. When the Senate recesses or adjourns on Thursday, January 3, 2008, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it shall stand recessed or adjourned until noon on Tuesday, January 22, 2008, or such other time on that day as may be specified in the motion to recess or adjourn, or until the time of any reassembly pursuant to section 3 of this concurrent resolution, whichever occurs first; and when the House adjourns on the legislative day of Thursday, January 3, 2008, on a motion offered pursuant to this concurrent resolution by its Majority Leader or his designee, it shall stand recessed or adjourned until noon on Tuesday, January 15, 2008, or until the time of any reassembly pursuant to section 3 of this concurrent resolution, whichever occurs first.

SEC. 3. The Majority Leader of the Senate and the Speaker of the House, or their respective designees, acting jointly after consultation with the Minority Leader of the Senate and the Minority Leader of the House, shall notify Members of the Senate and the House, respectively, to reassemble at such a place and time as they may designate if, in their opinion, the public interest shall warrant it.

Attest:

Secretary of the Senate.

Attest:

Clerk of the House of Representatives.

APPENDIX AL

Memorandum to the House of Representatives Returning Without Approval the "National Defense Authorization Act for Fiscal Year 2008"

December 28, 2007

I am withholding my approval of H.R. 1585, the "National Defense Authorization Act for Fiscal Year 2008," because it would imperil billions of dollars of Iraqi assets at a crucial juncture in that nation's reconstruction efforts and because it would undermine the foreign policy and commercial interests of the United States.

The economic security and successful reconstruction of Iraq have been top priorities of the United States. Section 1083 of H.R. 1585 threatens those key objectives. Immediately upon enactment, section 1083 would risk the freezing of substantial Iraqi assets in the United States—including those of the Development Fund for Iraq (DFI), the Central Bank of Iraq (CBI), and commercial entities in the United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed. This new

liability, in turn, will only increase the potential for immediate entanglement of Iraqi assets in the United States. The aggregate financial impact of these provisions on Iraq would be devastating.

While my Administration objected to an earlier version of this provision in previous communications about the bill, its full impact on Iraq and on our relationship with Iraq has become apparent only in recent days. Members of my Administration are working with Members of Congress to fix this flawed provision as soon as possible after the Congress returns.

Section 1083 would establish unprecedented legal burdens on the allocation of Iraq's funds to where they are most needed. Since the fall of Saddam Hussein, I have issued Executive Orders to shield from entanglement in lawsuits the assets of the DFI and the CBI. I have taken these steps both to uphold international legal obligations of the United States and to remove obstacles to the orderly reconstruction of Iraq. Section 1083 potentially would place these crucial protections of Iraq's core assets in immediate peril, by including a provision that might be misconstrued to supersede the protections I have put in place and to permit the judicial attachment of these funds. Iraq must not have its crucial reconstruction funds on judicial hold while lawyers argue and courts decide such legal assertions.

Moreover, section 1083 would permit plaintiffs to obtain liens on certain Iraqi property simply by filing a notice of pending action. Liens under section 1083 would be automatic upon filing a notice of a pending claim in a judicial district where Iraq's property is located, and they would reach property up to the amount of the judgment plaintiffs choose to demand

in their complaints. Such pre-judgment liens, entered before claims are tested and cases are heard, are extraordinary and have never previously been available in suits in U.S. courts against foreign sovereigns. If permitted to become law, even for a short time, section 1083's attachment and lien provisions would impose grave—indeed, intolerable—consequences on Iraq.

Section 1083 also includes provisions that would expose Iraq to increased liability in lawsuits. Contrary to international legal norms and for the first time in U.S. history, a foreign sovereign would be liable for punitive damages under section 1083. Section 1083 removes defenses common for defendants in the United States—including *res judicata*, collateral estoppel, and statutes of limitation—upon which the Iraqi government has relied. And section 1083 would attempt to revive a $959 million judgment against the new democratic Government of Iraq based on the misdeeds of the Saddam Hussein regime.

Exposing Iraq to such significant financial burdens would weaken the close partnership between the United States and Iraq during this critical period in Iraq's history. If Iraq's assets are frozen, even temporarily, that could reduce confidence in the Iraqi dinar and undermine the success of Iraq's monetary policy. By potentially forcing a close U.S. ally to withdraw significant funds from the U.S. financial system, section 1083 would cast doubt on whether the United States remains a safe place to invest and to hold financial assets. Iraqi entities would be deterred from engaging in commercial partnerships with U.S. businesses for fear of entangling assets in lawsuits. Section 1083 would be viewed with alarm

by the international community and would invite reciprocal action against United States assets abroad.

The adjournment of the Congress has prevented my return of H.R. 1585 within the meaning of Article I, section 7, clause 2 of the Constitution. Accordingly, my withholding of approval from the bill precludes its becoming law. *The Pocket Veto Case*, 279 U.S. 655 (1929). In addition to withholding my signature and thereby invoking my constitutional power to "pocket veto" bills during an adjournment of the Congress, I am also sending H.R. 1585 to the Clerk of the House of Representatives, along with this memorandum setting forth my objections, to avoid unnecessary litigation about the nonenactment of the bill that results from my withholding approval and to leave no doubt that the bill is being vetoed.

This legislation contains important authorities for the Department of Defense, including authority to provide certain additional pay and bonuses to servicemembers. Although I continue to have serious objections to other provisions of this bill, including section 1079 relating to intelligence matters, I urge the Congress to address the flaw in section 1083 as quickly as possible so I may sign into law the National Defense Authorization Act for Fiscal Year 2008, as modified. I also urge the Congress to ensure that any provisions affecting servicemember pay and bonuses, as well as provisions extending expiring authorities, are retroactive to January 1, 2008.

George W. Bush

The White House,
December 28, 2007.

APPENDIX AM

Thursday, January 3, 2008
Daily Digest

HIGHLIGHTS

Second Session of the One Hundred Tenth Congress convened as prescribed by the Constitution of the United States.

Senate

Chamber Action

Senate met in a pro forma session to convene the second session of the 110th Congress at 12:04:26, and recessed at 12:05:12 noon until 9 a.m., on Monday, January 7, 2008.

Committee Meetings

No committee meetings were held.

House of Representatives

Chamber Action

Public Bills and Resolutions Introduced: There were no Public Bills or Resolutions introduced in today's Record.

Additional Cosponsors: There were no Additional Cosponsors in today's Record.

Report Filed: A report was filed today as follows: H.R. 3524, to reauthorize the HOPE VI program for revitalization of severely distressed public housing, with an amendment (H. Rept. 110-507, 110th Congress, 1st Session). **Page H1**

Speaker: Read a letter from the Speaker wherein she appointed Representative Crowley to act as Speaker Pro Tempore for today. **Page H1**

Chaplain: The prayer was offered by the guest Chaplain, Monsignor Stephen J. Rossetti, President, St. Luke Institute, Silver Spring, Maryland. **Page H1**

Convening of the Second Session of the 110th Congress: The Chair announced that, pursuant to section 3 of H. Res. 877, 110th Congress, organizational and legislative business is dispensed with on this day. Bills and resolutions introduced today will be numbered today but will not be noted in the Record or referred until January 15, 2008. **Page H1**

Quorum Calls—Votes: There were no Yea and Nay votes, and there were no Recorded votes. There were no quorum calls.

Adjournment: The House met at 12 noon and pursuant to S. Con. Res. 61, 110th Congress, adjourned at 12:03 p.m. until noon on Tuesday, January 15, 2008.

Committee Meetings

No committee meetings were held.

Next Meeting of the SENATE

9 a.m., Monday, January 7

Senate Chamber

Program for Monday: Senate will meet in a pro forma session.

Next Meeting of the HOUSE OF REPRESENTATIVES

12 noon, Tuesday, January 15

House Chamber

Program for Tuesday, January 15th: To be announced.

* * * * *

APPENDIX AN

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008

SPEECH OF
HON. JOHN CONYERS, JR.
OF MICHIGAN
IN THE HOUSE OF REPRESENTATIVES
Wednesday, January 16, 2008

Mr. CONYERS. Madam Speaker, the provision that caused the President to veto the entire Defense bill simply reaffirms the original intent of Congress to allow victims of terrorism to hold countries that commit or provide material support for terrorist acts accountable. As a principal author of the provision, I am pleased that we were able to salvage much of it. But I am disappointed in the change that the President has insisted on.

The President has decided that it is of utmost importance to shield the Iraqi Government from suits by American soldiers who were brutally tortured by the Iraqi Government under Saddam Hussein, as prisoners of war during the gulf war. The soldiers were not only starved, denied sleep, and exposed to extreme temperatures. They were severely beaten, threatened with castration and dismemberment, and put through mock executions. As a result, they have sustained lasting physical and mental injuries.

These brave soldiers and their families have been waiting many years for justice in our courts. The President, through the actions of his lawyers in the courts, has endeavored to block their progress at every turn. He has even gone so far as to twist a provision Congress included in the Emergency Wartime Supplemental Appropriations Act of 2003, designed to remove restrictions on providing assistance to the new Iraqi Government, into an astonishing claim that Congress somehow implicitly thereby gave him authority to block court jurisdiction over suits against Iraq—a claim that disregards the understanding of those involved in negotiating that provision, as well as article III of the Constitution and the separation of powers.

And now, despite these new congressional efforts to help those soldiers, the President wants them to continue to wait—for the good, he says, of the new Iraqi Government. In order for the Defense bill to be signed, my colleagues and I have reluctantly had to amend this provision to allow the President to carve out the Iraqi Government entirely.

It is important to note that this change does not affect rights under current law. The President's waiver authority extends only to the provisions being newly enacted in this bill; by its clear terms, it does not extend to current law. There is ongoing litigation regarding the rights of these American soldiers under current law; if the President exercises his new waiver authority, that litigation will proceed unaffected by that waiver.

The difference is that, if the President exercises the waiver authority, these soldiers will not be helped by this new provision we wrote and passed, as we wanted them to be, and as they would be absent the

waiver. I believe current law, properly interpreted, already gives them the protection they need to obtain justice. Among other things, I believe it is clear, despite the administration's assertions and one aberrational court holding to the contrary, that Congress intended the 1996 amendment to the Foreign Sovereign Immunities Act to provide an explicit Federal statutory cause of action against state sponsors of terrorism for the victims. That intent is stated explicitly, among other places, in the House Judiciary Committee's report for the bill in the previous Congress, H. Rept. 103-702.

In the face of sustained efforts by the President to persuade the courts to disregard congressional intent, we wanted to give these soldiers, and other victims of state-sponsored terrorism, another clear path to obtaining justice. But the soldiers who suffered at the hands of Saddam Hussein will not get the benefit of this other clear path if the President exercises his waiver authority, as we expect he will.

And there is always a risk that the courts will be persuaded by the arguments of the President and his lawyers, and reach what we believe would be the wrong interpretation, and deny the soldiers' claims under current law. If so, then the waiver will have the effect of further delaying justice, and a very real possibility of making it harder to obtain at all. Because even though the waiver cannot permanently and irrevocably extinguish their claims, another delay may make it all the more difficult to gather the proof when those claims can once again be pursued.

For all these reasons, we did not want to make this change.

And when we ultimately concluded that the President was willing to hold the entire Defense bill hostage unless we did, we tried to limit the harm.

We wanted the President to have to weigh the interests of the victims in justice, and victims, why he believes those interests are outweighed by the interests of the Iraqi Government, and why he believes those interests cannot fairly be reconciled.

We wanted him to have to explain in those findings why he believes it necessary to shelter all of Iraq's assets from legal accountability, even when Iraq is reaping billions upon billions of dollars from its oil fields.

We wanted the President to have to reaffirm those findings periodically, so that they would not be set in stone.

And we wanted a sunset, to bring a definite end to what we believe is a manifest injustice.

Unfortunately, we were not able to achieve these goals.

What we have been able to do, instead, is to add a new sense of the Congress that the President should work with the Government of Iraq to get fair compensation to these victims. That is, of course, non-binding; but it could also create a new path to justice. And I hope the President will take it to heart, and act on it, and that through one of these paths, the victims will see some semblance of the justice they have been struggling for these many years.

Otherwise, I think the President will have done a grave disservice to these soldiers, who are only 17 in number, and whose treatment at the hands of our enemies, in the service of their country, calls for greater respect than they have been getting.

APPENDIX AO

Tuesday, January 22, 2008
Daily Digest

* * * * *

Senate

* * * * *

National Defense Authorization Act: By 91 yeas and 3 nays (Vote No. 1), Senate passed H.R. 4986, to provide for the enactment of the National Defense Authorization Act for Fiscal Year 2008, as previously enrolled, with certain modifications to address the foreign sovereign immunities provisions of title 28, United States Code, with respect to the attachment of property in certain judgments against Iraq, the lapse of statutory authorities for the payment of bonuses, special pays, and similar benefits for members of the uniformed services, clearing the measure for the President.

Pages S54-57

* * * * *

APPENDIX AP

Presidential Determination No. 2008-9 of January 28, 2008

Waiver of Section 1083 of the National Defense Authorization Act for Fiscal Year 2008

Memorandum for the Secretary of State

By the authority vested in me as President by the Constitution and the laws of the United States, including section 301 of title 3, United States Code, and section 1083(d) of the National Defense Authorization Act for Fiscal Year 2008 (the "Act"), I hereby determine that:

- All provisions of section 1083 of the Act, if applied to Iraq or any agency or instrumentality thereof, may affect Iraq or its agencies or instrumentalities, by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation.

- The economic security and successful reconstruction of Iraq continue to be top national security priorities of the United States. Section 1083 of the Act threatens those key priorities. If permitted to apply to Iraq, section 1083 would risk the entanglement of substantial Iraqi assets in litigation in the United States including those of the Development Fund for Iraq, the Central Bank of Iraq, and commercial entities in the

United States in which Iraq has an interest. Section 1083 also would expose Iraq to new liability of at least several billion dollars by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq is relying in pending litigation, and by creating a new Federal cause of action backed by the prospect of punitive damages to support claims that may previously have been foreclosed. If permitted to apply to Iraq, section 1083 would have a significant financial impact on Iraq and would result in the redirection of financial resources from the continued reconstruction of Iraq and the harming of Iraq's stability, contrary to the interests of the United States.

• A waiver of all provisions of section 1083 with respect to Iraq and any agency or instrumentality of Iraq is therefore in the national security interest of the United States and will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq.

• Iraq continues to be a reliable ally of the United States and a partner in combating acts of international terrorism. The November 26, 2007, Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America confirmed the commitment of the United States and Iraq to build an enduring relationship in the political, diplomatic, economic, and security arenas and to work together to combat all terrorist groups, including al-Qaida.

Accordingly, I hereby waive all provisions of section 1083 of the Act with respect to Iraq and any agency or instrumentality thereof.

You are authorized and directed to notify the Congress of this determination and waiver and the accompanying memorandum of justification, incorporated by reference herein, and to arrange for their publication in the *Federal Register*.

GEORGE W. BUSH
THE WHITE HOUSE,
Washington, January 28, 2008.

MEMORANDUM OF JUSTIFICATION FOR WAIVER OF SECTION 1083 OF THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 2008 WITH RESPECT TO IRAQ

Section 1083 of the National Defense Authorization Act for Fiscal Year 2008 (the "Act") amends the Foreign Sovereign Immunities Act, which establishes a framework for lawsuits against foreign countries and their agencies and instrumentalities under U.S. law. Immediately upon enactment, Section 1083 would put at risk substantial Iraqi assets in the United States that are crucial to Iraq's recovery efforts—including the Development Fund for Iraq, the assets of the Central Bank of Iraq held by the Federal Reserve Bank of New York, and assets of Iraqi agencies or instrumentalities used in commercial transactions in the United States. Section 1083 would also expose Iraq to potential new

liability by undoing judgments favorable to Iraq, by foreclosing available defenses on which Iraq has relied, and by creating a new Federal cause of action backed by punitive damages. Any and all provisions of section 1083 may adversely affect Iraq or its agencies or instrumentalities, by exposing Iraq or its agencies or instrumentalities to liability in United States courts and by entangling their assets in litigation. Such burdens would undermine the national security and foreign policy interests of the United States, including by weakening the ability of the democratically-elected government of Iraq to use Iraqi funds to promote political and economic progress and further develop its security forces.

Section 1083(d)(l)-(3) of the Act provides that:

(d) Applicability to Iraq-

(1) APPLICABILITY- The President may waive any provision of this section with respect to Iraq, insofar as that provision may, in the President's determination, affect Iraq or any agency or instrumentality thereof, if the President determines that—

(A) the waiver is in the national security interest of the United States;

(B) the waiver-will promote the reconstruction of, the-consolidation of democracy in, and the relations of the United States with, Iraq; and

(C) Iraq continues to be a reliable ally of the United States and partner in combating acts of international terrorism.

(2) TEMPORAL SCOPE.—The authority under paragraph (1) shall apply

(A) with respect to a conduct or event occurring before or on the date of the enactment of this Act;

(B) with respect to any conduct or event occurring before or on the date of the exercise of that authority; and

(C) regardless of whether, or the extent to which, the exercise of that authority affects any action filed before, on, or after the date of the exercise of that authority or of the enactment of this Act.

(3) NOTIFICATION TO CONGRESS.—A waiver by the President under paragraph (1) shall cease to be effective 30 days after it is made unless the President has notified Congress in writing of the basis for the waiver as determined by the President under paragraph (1).

A waiver of all provisions of section 1083 with respect to Iraq, and all agencies and instrumentalities thereof, is in the national security interest of the United States and will promote the reconstruction of, the consolidation of democracy in, and the relations of the United States with, Iraq. In particular:

• Absent a waiver, section 1083 would have a potentially devastating impact on Iraq's ability to use Iraqi funds to expand and equip the Iraqi Security Forces, which would have serious implications for U.S. troops in the field acting as part of the Multinational Force-Iraq and would harm anti-terrorism and counter-insurgency efforts.

• Application of section 1083 to Iraq or any agency or instrumentality thereof will hurt the interests of the United States by unacceptably interfering with

political and economic progress in Iraq that is critically important to bringing U.S. troops home.

- If applied to Iraq or any agency or instrumentality thereof, the provisions of section 1083 would redirect financial resources from the continued reconstruction of Iraq and would harm Iraq's stability, contrary to the interests of the United States. A waiver will ensure that Iraqi assets of the Central Bank of Iraq, the government and commercial entities in which Iraq has an interest, remain available to maintain macroeconomic stability in Iraq and support private-sector development and trade.

- By providing for the maintenance of macroeconomic stability, the waiver of section 1083 will promote the consolidation of democracy in Iraq.

- Absent a waiver of section 1083, Iraq's ability to finance employment alternatives, vocational training, and job placement programs necessary to promote community reintegration and development efforts contributing to counterterrorism efforts would be harmed.

- By ensuring that Iraq and its agencies and instrumentalities are not subject to litigation or liability pursuant to section 1083, waiver of section 1083 will promote the close relationship between the United States and Iraq.

In addition, Iraq continues to be a reliable ally of the United States and partner in-combating acts of international terrorism. The November 26, 2007 Declaration of Principles for a Long-Term Relationship of Cooperation and Friendship between the Republic of Iraq and the United States of America confirmed the commitment of the United

States and Iraq to build an enduring relationship in the political, diplomatic, economic, and security arenas and to work together to combat all terrorist groups and international terrorism, including al-Qaida. This Declaration reinforced the crucial actions Iraq is taking against terrorists groups, including al-Qaida.